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No. 11322

25,2445

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Trustee,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

FILED
JUL 29 1946
PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11322

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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—direct 160

—cross 167

Weill, Lawrence I.

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Los Angeles, California,

Attorneys for Plaintiff and Appellee.

In the District Court of the United States
Northern District of California
Southern Division

No. 23580-R

HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, TRUSTEE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF TAXES ILLEGALLY ASSESSED AND COLLECTED

Comes Now the plaintiff and complains of defendant and for cause of action alleges:

I.

That Bank of America National Trust and Savings Association above named at all times mentioned was a national banking association, duly organized and existing under the laws of the United States, with its principal office located in the City and County of San Francisco, State of California, and in the Northern District of California, Southern Division.

That plaintiff has at all times borne true allegiance to the government of the United States of America, and has not in any way voluntarily aided, abetted or given encouragement to a rebellion

against said government, nor at any time aided or abetted in [1*] any manner or given comfort to any sovereign or government that is, or ever has been, at war with said United States.

II.

That on or about the 28th day of January, 1926, in the City of Bakersfield, County of Kern, State of California, Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague, and Elizabeth S. Smith, as Trustors, entered into a trust agreement with the Security Trust Company, a California corporation, as Trustee, and conveyed certain real property to said Trustee, and that on or about the 23rd day of June, 1937, said individuals executed a supplemental agreement. That copies of said trust agreement and supplemental agreement, a part of Exhibit A attached to this complaint, are hereby referred to, and made a part hereof. That Security Trust Company was succeeded in interest as Trustee of said trust on or about the 23rd day of June, 1937, by the above-named Bank of America National Trust and Savings Association, and the latter ever since has been, and still is, the duly constituted and acting Trustee of said trust and the real party in interest in this action.

III.

That at all times herein mentioned the above-

* Page numbering appearing at foot of page of original certified Transcript of Record.

named defendant was, and now is, a sovereign body politic, by whom, through its agents, the taxes for which refund is here claimed were erroneously and illegally assessed and collected.

IV.

That plaintiff seeks to recover from defendant the sum of $2,059.50, together with interest thereon as provided by law from the dates of payment thereof; said sum being the amount of income and excess profits taxes for the taxable year ending December 31, 1938, to-wit, $2,055.25, together with interest in the amount of $4.25, erroneously and illegally assessed and collected [2] from plaintiff by defendant.

V.

That on or about the 17th day of February, 1939, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income and excess profits tax return for the taxable year ending December 31, 1938, on Form 1120A issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $2,000.94. That said tax was duly paid on or about the 17th day of February, 1939, in the manner provided by law. That thereafter a deficiency assessment of income tax for said taxable year was made against plaintiff in the amount of $54.31, which said deficiency assessment, together with interest in the amount of $4.25, was paid by

plaintiff to defendant on or about the 8th day of July, 1940. That the total amount paid by plaintiff to defendant as income and excess profits taxes for said taxable year and interest thereon, as aforesaid, was the sum of $2,059.50.

VI.

That said sum paid by plaintiff as income and excess profits taxes and interest thereon was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as taxes, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

VII.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 901 (a) (2) of the Revenue Act of 1938. [3]

VIII.

That the said trust agreement executed under date of January 28, 1926, was executed to secure the repayment to the Trustee of a loan in the sum of $14,000.00 made concurrently with the execution of said trust agreement; that the said trust was not possessed of features which would make it analogous to a corporation, in that the said trust agreements made no provision for the appointment of

successor Trustees to insure the continuity of the trust; the trust had no name as an entity; there were no officers of the trust, except as the managers appointed under the provisions thereof might be so considered; and they did not organize; there were no provisions for taking in additional capital or members; the trust agreements provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest; the trust agreements expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens and encumbrances against the property covered by the trust agreements, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property, or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust, or their beneficial interests in the trust; the beneficiaries were the equitable owners of the real property conveyed in trust to the Trustee and their beneficial interests were not merely personal claims; the trust agreement provided for the revocation of the trust upon the repayment of all loans and other money due said Trustee, and in such event the Trustee was required to convey and deliver to the then beneficiaries under the trust, as their interests might appear, the title to all of the real property then vested in the Trustee; the Trustee under the said

trust agreements held title to the property conveyed thereby [4] for the protection of its loans and was powerless to act other than upon the direction of the Board of Managers appointed pursuant to the provisions of the said trust agreements.

IX.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of income and excess profits taxes in the amount of $2,059.50, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1938, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit A, referred to, and by this reference made a part hereof. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated August 10, 1942, a copy of which said notice is hereto attached, marked Exhibit H, referred to, and by this reference made a part hereof.

X.

That no part of said sum of $2,059.50 erroneously and illegally collected from plaintiff by defendant as aforesaid as income and excess profits taxes, and

interest thereon, has been repaid or refunded to plaintiff, and said sum of $2,059.50, together with interest from the dates of payment, is due, unpaid and owing from defendant to plaintiff.

XI.

That plaintiff is the sole and absolute owner of the claim here sued upon, and has made no transfer or assignment of the same, or any part thereof, or of any interest therein. No action upon said claim here sued upon has been taken before Congress, [5] or other of the departments of said government or any court other than the complaint filed in this court, and there are no just or other offsets to or against said claim.

SECOND CAUSE OF ACTION

For another, further and second cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this second cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $1,856.54, together with interest thereon as provided by law from the date of payment thereof; said sum being the amount of income and excess profits taxes for the taxable year ending De-

cember 31, 1939, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 21st day of February, 1940, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income and excess profits tax return for the taxable year ending December 31, 1939, on Form 1120A issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $1,894.14. That said tax was duly paid on or about the 21st day of February, 1940, in the manner provided by law. That thereafter an overassessment of income tax for said taxable year was made against said plaintiff in the amount of $37.60. That the total amount paid by plaintiff to defendant as income and excess profits taxes for said taxable year, as aforesaid, was the sum of $1,856.54. [6]

IV.

That said sum paid by plaintiff as income and excess profits taxes was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as taxes, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

V.

That the beneficiaries under the trust evidenced

by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 3797 (a) (3) of the Internal Revenue Code.

VI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of income and excess profits taxes in the amount of $1,856.54, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1939, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit B, referred to, and by this reference made a part hereof. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated August 10, 1942, a copy of which said notice is hereto attached, marked Exhibit H. referred to, and by this reference made a part hereof. [7]

VII.

That no part of said sum of $1,856.54 erroneosuly and illegally collected from plaintiff by defendant

as aforesaid as income and excess profits taxes has been repaid or refunded to plaintiff, and said sum of $1,856.54, together with interest from the date of payment, is due, unpaid and owing from defendant to plaintiff.

THIRD CAUSE OF ACTION

For another, further and third cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this third cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $1,147.43, together with interest thereon as provided by law from the date of payment thereof; said sum being the amount of income and defense taxes for the taxable year ending December, 31, 1940, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 12th day of March, 1941, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income, declared value excess profits and defense tax return for the taxable year ending December 31, 1940, on

Form 1120 issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $1,147.43. That said tax was duly paid on or about the 12th day of March, 1941, in the manner provided by law. That thereafter an over-assessment of income tax for said taxable year was made against plaintiff in the amount of $53.45, which said overassessment, together with interest thereon, remains unpaid. That the total amount paid by plaintiff to defendant as income and defense taxes for said taxable year was the sum of $1,147.43.

IV.

That said sum paid by plaintiff as income and defense taxes was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as taxes, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

V.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property and were not an association within the intent and meaning of Section 3797 (a) (3) of the Internal Revenue Code.

VI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commis-

sioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of income, excess profits and defense taxes in the amount of $1,147.43, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1940, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit C, referred to, and by this reference made a part hereof. That plaintiff's claim for refund was thereafter rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue [9] dated October 1, 1942, a copy of which said notice is hereto attached, marked Exhibit I, referred to, and by this reference made a part hereof.

VII.

That no part of said sum of $1.147.43 erroneously and illegally collected from plaintiff by defendant as aforesaid as income and defense taxes has been repaid or refunded to plaintiff and said sum of $1,147.43, together with interest from the date of payment, is due, unpaid and owing from defendant to plaintiff.

FOURTH CAUSE OF ACTION

For another, further and fourth cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this fourth cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $50.00, together with interest thereon as provided by law from the date of payment thereof; said sum being the amount of capital stock tax for the taxable year ending June 30, 1938, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 26th day of July, 1938, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1938, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $50,000.00 was declared in accordance with the provisions of law, and the tax of $50.00 based upon said declared value was duly paid on or about the 26th day [10] of July, 1938, in the manner provided by law, by plaintiff to defendant.

IV.

That said sum paid by plaintiff as capital stock tax was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as a tax, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

V.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 1001 (a) (2) of the Revenue Act of 1936.

VI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $50.00, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1938, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit D, referred to, and by this reference made a part hereof.

That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a copy of which said notice is hereto attached, marked Exhibit J, referred to, and by this reference made a part hereof. [11]

VII.

That no part of said sum of $50.00 erroneously and illegally collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff, and said sum of $50.00, together with interest from the date of payment, is due, unpaid and owing from defendant to plaintiff.

FIFTH CAUSE OF ACTION

For another, further and fifth cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this fifth cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $75.00, together with interest thereon as provided by law from the date of payment thereof; said sum being the amount of capital stock tax for the taxable year end June 30, 1939, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 18th day of August, 1939, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1939, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $75,000.00 was declared in accordance with the provisions of law, and the tax of $75.00 based upon said declared value was duly paid on or about the 18th day of August, 1939, in the manner provided by law, by plaintiff to defendant. [12]

IV.

That said sum paid by plaintiff as capital stock tax was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as a tax, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

V.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 901 (a) (2) of the Revenue Act of 1938.

VI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $75.00, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1939, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit E, referred to, and by this reference made a part hereof. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a copy of which said notice is hereto attached, marked Exhibit J, referred to, and by this reference made a part hereof.

VII.

That no part of said sum of $75.00 erroneously and illegally collected from plaintiff by defendant as aforesaid as [13] capital stock tax has been repaid or refunded to plaintiff, and said sum of $75.000, together with interest from the date of payment, is due, unpaid and owing from defendant to plaintiff.

SIXTH CAUSE OF ACTION

For another, further and sixth cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this sixth cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $99.00, together with interest thereon as provided by law from the date of payment thereof; said sum being the amount of capital stock tax for the taxable year ending June 30, 1940, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 30th day of July, 1940, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1940, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $90,000.00 was declared in accordance with the provisions of law, and the tax of $99.00 based upon said declared value was duly paid on or about the 30th day of July, 1940, in the manner provided by law, by plaintiff to defendant.

IV.

That said sum paid by plaintiff as capital stock tax was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as a tax, or otherwise, [14] or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

V.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 3797 (a) (3) of the Internal Revenue Code.

VI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $99.00, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1940, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit F, referred to, and by this reference made a part hereof. That thereafter plaintiff's claim for re-

fund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a copy of which said notice is hereto attached, marked Exhibit J, referred to, and by this reference made a part hereof.

VII.

That no part of said sum of $99.00 erroneously and illegally collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff, and said sum of $99.00, together with interest from the date of payment, is due, unpaid and owing from defendant to plaintiff.

SEVENTH CAUSE OF ACTION

For another, further and seventh cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this seventh cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $187.50, together with interest thereon as provided by law from the dates of payment thereof; said sum being being the amount of capital stock tax for the taxable year ending June 30, 1941, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 30th day of July, 1941, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1941, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $150,000.00 was declared in accordance with the provisions of law, and the tax of $187.50 based upon said declared value was duly paid, in the manner provided by law, by plaintiff to defendant.

IV.

That said sum paid by plaintiff as capital stock tax was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as a tax, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges: [16]

V.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 3797 (a) (3) of the Internal Revenue Code.

VI.

That on or about the 16th day of February, 1942,

plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $187.50, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1941, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit G, referred to, and by this reference made a part hereof. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a copy of which said notice is hereto attached, marked Exhibit J, referred to, and by this reference made a part hereof.

VII.

That no part of said sum of $187.50 erroneously and illegally collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff, and said sum of $187.50, together with interest from the dates of payment, is due, unpaid and owing from defendant to plaintiff.

Wherefore, plaintiff prays judgment against the defendant in the sum of $5,474.97, together with interest thereon as provided by law from the date

of payment thereof; for plaintiff's [17] costs herein incurred; and for such other and further relief as to the court may seem just in the premises.

LLOYD G. RAINEY and
PAUL C. JONES,
By /s/ LLOYD G. RAINEY,
Attorneys for Plaintiff.

EXHIBIT A

Form 843

Internal Revenue Service
Treasury Department
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collectors Stamp: (Dated received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Exhibit A—(Continued)

State of California,

County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from January 1, 1938, to December 31, 1938.

3. Character of assessment or tax: Income and Excess Profits Taxes.

4. Amount of assessment, $.....; dates of payment 2-17-39, $2,000.94; 7-8-1940, $58.56.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $2,059.50.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be

Exhibit A—(Continued)

legally filed expires, under section 322 of the Internal Revenue Code on March 15, 1942.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,
By BANK OF AMERICAN NATIONAL TRUST AND SAVINGS ASS'N.,
Trustee.
By W. W. WATSON.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL,

Claimant was not an association coming within the meaning and intent of Section 901 (a) (2) of the Revenue Act of 1938 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooks, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, are

Exhibit A—(Continued)

attached hereto, marked "Exhibit A" and "Exhibit B," respectively, referred to, and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property [20] conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to

Exhibit A—(Continued)

the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest, and therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Exhibit A—(Continued)

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee, and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [21]

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed an income and excess profits tax return for claimant for the calendar year 1938. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street,
Los Angeles, California. [22]

Declaration of Trust, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare,

Exhibit A—(Continued)

C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague, and Elizabeth S. Smith, Trustors and the Security Trust Company, a corporation of Bakersfield, California, Trustee,

Witnesseth:

That Whereas the Trustors have caused or will cause to be executed and delivered to the Trustee, a deed conveying to it that certain real property situated in the County of Kern, State of California, and more particularly described as:

The Southwest quarter (SW¼) of Section Twelve (12) in Township Twenty-nine (29) South, Range Twenty-seven (27) East, M.D.B. & M., subject to the restrictions, reservations, easements and rights of way of record and those also recited in the above mentioned deed, and

Whereas no part of the consideration therefor was paid by said Trustee except as herein otherwise mentioned and provided for, but was paid by or on behalf of the beneficiaries hereinabove named, and

Whereas the parties hereto desire the Trustee to hold said property in trust for the uses and purposes herein provided,

Now, Therefore, it is expressly understood and agreed that said Trustee will hold said real prop-

Exhibit A—(Continued)

erty in trust under the terms and conditions and for the uses and purposes set forth in this declaration, as follows:—

I.

(A Board of Managers consisting of three beneficiaries of this trust shall be vested with all the powers and shall be burdened with all the responsibilities provided therefor under this Declaration of Trust. Harry E. Hake, L. I. Weill and A. E. Stegeman shall constitute the first Board of Managers. Any two [23] members of said Board of Managers while in office shall have full power and authority to perform any act which the said Board are entitled to, or are required to perform hereunder. Each member of said Board shall hold office at the pleasure of the majority in interest of the beneficiaries of this trust. When the office of a member of the Board shall become vacant, upon his written resignation being filed with the Trustee; upon his removal from office by written memorandum signed by a majority in interest of the beneficiaries of the trust; by his death, or upon his ceasing to be a beneficiary of this trust, then the majority in interest of the beneficiaries may fill said office and file with the Trustee a memorandum signed by them, designating the member appointed to fill the vacancy.)

II.

The Trustee, hereinafter sometimes called the Payee, shall hold said property as security for the

Exhibit A—(Continued)

payment to it of the sum of Fourteen Thousand Dollars ($14,000.00) as evidenced by that certain promissory note signed by the Board of Managers dated January 28, 1926, together with interest thereon as therein provided, and for the payment to said Payee for such other loans and advances as may be made by Payee during the continuance of this Trust to the then acting Board of Managers as evidenced by any promissory note or notes executed by two or more members of said Board, together with interest thereon as herein provided. Each Trustor agrees that he, his successors and assigns, shall be severally liable to the Payee for payment of the balance due on said note or notes in the proportion set opposite his name as beneficiary hereunder.

III.

Said Trustee shall subdivide and improve said real property in such manner as may be agreed upon between the Board of Managers and Trustee hereunder.

In Which Event a map of such new Subdivision shall be [24] prepared by the Board of Managers, executed and acknowledged by the Trustee, and filed for record in the office of the County Recorder of Kern County, California, said Trustee being hereby authorized to dedicate to public use all streets and alleys shown on the Map of such new subdivision.

To Sell said real property by lot or lots free of

Exhibit A—(Continued)

the lien of the Payee hereunder, upon such terms and conditions, to such purchasers, for such prices and payable in such manner as said Trustee may deem best, provided however, that the sale prices of said property shall not be less than those agreed upon by said Trustee and the Board of Managers or the selling agent of said land acting under the provisions of Article IX of this Declaration, and

Provided further, however, that the selling price of any parcel of said property shall not be less than that portion of the amount then due the payee hereunder that the area of the parcel so sold bears to the then unsold parcels of all of said land and promises;

To Receive the proceeds arising from the sale of said property.

IV.

To Distribute the cash proceeds arising from the execution of said note or notes or from the sale of lot or lots hereunder as follows:

(1) To the payment of the costs, fees, and expenses of the Trustee hereunder.

(2) To the commission if any, of the authorized selling agent for making the sale of said property which is hereby fixed at ten per cent of the gross selling price;

Provided further however, that in the event of a sale of any of said property by contract or on

Exhibit A—(Continued)

installments, there shall be deducted and paid to the agent out of the installments received only one-half of the instalment toward said agent's [25] commission from time to time and until his commission has been fully paid.

(3) To the payment of the amount required to procure a release or releases of the lot or lots so sold from the lien of any encumbrance or encumbrances then of record against the same unless such lot or lots be sold subject thereto.

(4) To the payment of such bills approved by the Board of Managers for labor and material, if any, utilized for the improvement of the property covered hereby.

(5) To the Payee, to apply on the note or notes executed by the Board of Managers in connection with this Trust until such note or notes, together with interest and other advances due the Trustee hereunder have been fully paid.

(6) The balance thereof not otherwise required for the purpose of this Trust, to the Beneficiaries as their interest may appear.

V.

The Beneficiaries of this trust at the time of the creation of this trust and the ratio or share of their respective interests are as follows:

Harry E. Hake	2/28ths
L. I. Weill	2/28ths

Exhibit A—(Continued)

A. E. Stegeman	7/28ths
Anita Clare	2/28ths
C. O. Sprague	2/28ths
John P. Brook	2/28ths
Boyd I. Kern	1/28th
Thomas Hope	1/28th
Joe Smith	2/28ths
J. M. Kirby	2/28ths
K. S. McKee	2/28ths
Ruth M. Legerton	1/28th
F. T. Sprague	1/28th
Elizabeth S. Smith	1/28th

VI.

No Sale or Transfer of any beneficial interest hereunder shall be valid or be binding on said trustee until an executed original of the assignment or other instrument evidencing such sale or transfer has been filed with said Trustee, excepting only where such interest may pass or be transferred by Decree or Order of Court, and then only upon satisfactory proof of the regularity and validity of the proceedings in such matter being presented to said Trustee.

If The Property herein described or any portion thereof, or the proceeds or avails thereof, become liable for the payment of any inheritance, income, or other tax, said Trustee is authorized to withhold and pay such tax out of any money in its hands for the account of the person whose interests hereunder are so liable, unless such tax shall

Exhibit A—(Continued)

have been paid by such person or someone else in his behalf.

Provided, if any such tax be not so paid and there are not sufficient moneys in the hands of said trustee under this Trust to pay the same, the Trustee may, at its option (but shall not be obligated so to do), advance a sufficient sum to pay such tax, which advancement, with interest thereon at the rate of seven per cent (7%) per annum from date of advancement to date of repayment, shall constitute a first lien on said property covered hereby, subject only to the incumbrances hereinbefore described.

All of said Trustors hereunder do, severally, well and truly bind themselves to pay, when due, their respective proportions of the principal and interest of all liens, and encumbrances against the property covered hereby, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of said property or the title thereof, and the costs, charges and expenses of this trust, together with all other sums or amounts properly [27] payble by them in connection with this trust, the property herein described or the beneficial interests hereunder.

Said Trustee shall not be required to attend to or procure any insurance upon any building upon any property covered hereby, or to pay or attend to the payment of principal or interest of any debt

Exhibit A—(Continued)

or incumbrance, or any taxes or assessments levied or assessed against the property covered hereby so long as this Trust shall continue, or to collect or disburse any rentals thereof; but all such services shall be performed and the expenses thereof borne by said Trustors, their successors and assigns.

Nor shall said Trustee be required to commence or defend any suit or suits with respect to said property covered hereby unless request so to do in writing by said Trustors or Payees or Beneficiaries hereunder, or either of them, accompanied by a sum of money sufficient in the judgment of said Trustee, to cover all costs and charges in connection therewith.

It Is Distinctly Understood that all deeds, contracts of sale and other instruments affecting property covered hereby shall be executed solely by said Trustee;

And that all moneys in connection with this Trust (excepting only rentals as hereinbefore provided) shall be paid to said Trustee for distribution in accordance with the provisions herein set forth.

VII.

If Default is made in the payment of said debts to the Trustee or Payee secured hereby, or either or any of them, or any installment of interest on either or any of them, then said Trustee or Payee hereunder may declare all sums owing to it and secured hereby immediately due and payable, and

Exhibit A—(Continued)

shall execute and deliver and record in the office of the Recorder of the County in which the property covered hereby or some part thereof is situated, a notice of such default and breach and of election to cause said property to be sold to satisfy said obligations. [28]

And after three (3) months shall have elapsed following said recordation of said notice, said Trustee—without demand on the Beneficiaries or Payee hereunder or any other person—shall sell the property then covered hereby in such parcels and at such times and places as it shall deem best to accomplish the objects of these trusts, having first given notice of the time and place of such sale or sales, in the manner and for a time not less than that required by law for sales of real property upon execution.

The Trustee, from time to time, may postpone the sale of all or any portion of said property by publication, prior to the date of sale so advertised, a notice of postponement in the same newspaper or newspapers in which the original notice of sale was published, or by public announcement thereof at the time and place of sale so advertised or postponed.

Such Sale or sales shall be made in the following manner, namely:

At the Time and place of sale fixed as hereinbefore provided the Trustee may sell the property so advertised or any portion thereof either en masse

Exhibit A—(Continued)

or in separate parcels at its sole discretion, at public auction, to the highest bidder for cash in gold coin of the United States, and, after any such sale and due payment made, shall execute and deliver to the purchaser or purchasers, a deed or deeds conveying the property so sold to such purchaser or purchasers but without covenant or warranty, express or implied, regarding the title or incumbrances, whereupon such purchaser or purchasers shall be let into immediate possession of such property, and all other persons in possession thereof shall be deemed to be tenants at sufferance; and the recitals in each such deed, of any facts or matters affecting the regularity or validity of such sale, shall be conclusive proof of the truthfulness of such recitals, and such deed shall be conclusive against all persons as to all matters recited therein; and the receipt for the purchase money contained in any deed executed to a purchaser as aforesaid, shall be sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money according to the trusts herein contained or otherwise.

The Trustee or Payee or any person on its behalf, or any other person, may purchase at such sale.

Distribution of the proceeds, received by said Trustee, arising from such sale or sales, shall be made by it as follows:—

1st: To the payment of all expenses of such

Exhibit A—(Continued)

sale, including posting and advertising, and costs, fees, charges and expenses of this Trust; also Trustee's fee for making such sale hereby fixed at Two Hundred Dollars ($200.00) in said Gold coin; which said amounts shall all become due, and payable upon receipt by said Trustee of written declaration of default and demand aforesaid.

2nd: To the payment of all sums which may have been advanced by said Trustee for the preservation, maintenance or protection of the property covered hereby, the title thereto, or any beneficial interest hereunder, and not repaid, with accrued interest thereon.

3rd: To the payment to the Payee of all sums then due said Payee hereunder with accrued interest thereon.

4th: And the balance, (if any) to the person or persons legally entitled thereto.

VIII.

This Trust shall not cease or terminate in any event until all of the costs, fees, expenses, liabilities and advances with interest of said Trustee hereunder shall have been fully paid.

IX.

For a period of one year from date and thereafter until the Trustee is otherwise notified in writing by the Board of Managers, Harry E. Hake is hereby designated as the selling agent of said land and when he shall request the Trustee in writing

Exhibit A—(Continued)

to make a [30] sale of any lot or lots in said subdivision to such person, for cash or on such terms as shall be designated in said order, the Trustee shall proceed to sell by conveyance, or contract for the sale by agreement of such lots in accordance with such request. All such conveyances or agreements shall be subject to all of the restrictions, reservations, easements and rights of way of record.

X.

The power is hereby vested in the beneficiaries and said Trustee does hereby assent to the express power and right vested in said beneficiaries to revoke this trust in whole or in part at any time after one year from the date hereof by notice of revocation in writing addressed and delivered to said Trustee at least sixty days prior to such revocation taking effect, provided, however, that both the payee and the Trustee shall have been repaid all loans, advances and all other sums of money whatsoever due said Trustee and said payee under this Declaration and under the notes, obligations and other indebtedness hereby secured.

Upon the termination of this trust at the expiration of said sixty days and the repayment of all of said loans, advances and other obligations due the payee and the Trustee hereunder the Trustee shall transfer, convey and deliver to the then beneficiaries hereunder as their interest may appear, the title to all of the said land and premises then vested in the Trustee hereunder, subject, however, to the

Exhibit A—(Continued)

then existing contracts of sale, agreements, leases, tax liens and assessments, encumbrances and other obligations incurred in reference thereto.

XI.

The costs, fees and expenses of the Trustee hereunder are hereby fixed as follows:

1st: Usual fees for preparing, executing, and recording instruments, and issuing Guarantee showing title to the real property covered hereby vested in said Trustee; together with expense of internal revenue or such other tax as may be imposed by [31] law upon all instruments necessary for execution hereunder; also proper compensation for preparing income and other tax reports required by law.

2nd: One Hundred Dollars ($100.00) for the drawing and execution of this Declaration and the acceptance of this trust. Should this trust not terminate within one year from the date hereof, then said Trustee shall receive an additional sum of Twenty-five dollars ($25.00) for each year, or fractional year, thereafter.

3rd: One per cent (1%) of the cash consideration paid upon the outright purchase of any property covered hereby or of the initial or down payment made by any purchaser under contract or agreement of sale; and 2% of the installments of principal and interest collected under agreements or contract or sale on any property covered by this Declaration.

Exhibit A—(Continued)

4th: And reasonable compensation for any service rendered by said Trustee in the execution of this trust for which the costs, fees and expenses are not herein provided.

5th: The sum of Twenty-five Dollars ($25.00) for the final closing, distributing and settlement of this trust.

In Witness Whereof the parties hereto have hereunto set their hands this 28th day of January, 1926, at Bakersfield, California.

Harry E. Hake	F. E. Sprague
L. I. Weill	Joe Smith
A. E. Stegeman	J. M. Kirby, M.D.
Anita Clare	K. S. McKee
C. O. Sprague	Elizabeth S. Smith
John P. Brooke	Thomas Hope
Boyd Kern	Ruth M. Legerton

SECURITY TRUST COMPANY,

A Corporation.

As Trustor.

By C. C. LEGERTON,

Its Assistant,

Trust Officer. [32]

Exhibit A—(Continued)

EXHIBIT "B"

HOMECREST SUPPLEMENTAL

AGREEMENT

Whereas, by agreement dated on or about the 28 day of January, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd T. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, as Trustors, and Security Trust Company, a corporation of Bakersfield, California, as Trustee, a Declaration of Trust was made whereby said Security Trust Company acknowledged the holding i ntrust upon the terms and conditions therein specified, of the following real property situate in the County of Kern, State of California, particularly described as follows, to-wit:

The Southwest Quarter (SW¼) of Section Twelve (12) in Township Twenty-nine (29) South, Range Twenty-seven (27) East, M.D.B. & M.;

And Whereas, Bank of America National Trust and Savings Association is now the successor to said Security Trust Company, and as such successor has succeeded to all the rights, powers, duties and liabilities conferred or imposed upon said Security Trust Company under the terms of said Declaration of Trust; and

Exhibit A—(Continued)

Whereas, Paragraph II of said Declaration of Trust provides as follows:

"The Trustee, hereinafter sometimes called the Payee, shall hold said property as Security for the payment to it of the sum of Fourteen Thousand dollars ($14,000.00) as evidenced by that certain promissory note signed by the Board of Managers dated January 28, 1926, together with interest thereon as therein provided, and for the payment to said Payee for such other loans and advances as may be made by the Payee during the continuance of this Trust to the then acting Board of Managers as evidenced by any promissory note or notes executed by two or more members of said Board, together with interest thereon as therein provided. Each Trustor agrees that he, his successors and assigns, shall be severally liable to the Payee for payment of the balance due on said note or notes in the proportion set opposite his name as beneficiary hereunder."

And Whereas, said Bank of America National Trust and Savings Association may, pursuant to the provisions of said Paragraph II, make other loans and advances under said Declaration of Trust evidenced by promissory note or notes executed by the Board of Managers as created by said Declaration of Trust, upon the condition, however, that the beneficiaries under said Declaration of Trust shall agree to become personally liable to said Bank of America National Trust and Savings Association for such loans or advances in the proportion that the inter-

Exhibit A—(Continued)

est of each beneficiary bears to the total of the beneficial interests held by said beneficiaries,

Now, Therefore, it is hereby agreed as follows, to-wit:

1. That said Bank of America National Trust and Savings Association may make such loans and advances, as in its discretion it may determine, to said Board of Managers, to be evidenced by promissory note or notes executed by said Board of Managers.

2. That the repayment of said loans or advances shall be secured by said Declaration of Trust and enforced according to the terms and conditions set forth in said Declaration of Trust.

3. That the said Board of Managers may execute a promissory note or notes evidencing said loans or advances and specifying the time and manner of repayment, and the interest thereon, and that said notes may be renewed from time to time as agreed upon [34] between Bank of America National Trust and Savings Association and said Board of Managers.

4. That each of the undersigned being present beneficiaries under said declaration of trust shall be personally liable to said Bank of America National Trust and Savings Association for said loans or advances to the extent of the fractional interest of each beneficiary as set opposite the signature of each beneficiary on this agreement, and that the

Exhibit A—(Continued)

extent and manner of such liability shall be determined by the promissory note or notes executed by said Board of Managers to evidence said loans or advances or any renewals thereof.

5. That said personal liability of the undersigned beneficiaries may be enforced by said Bank of America National Trust and Savings Association without resort to the foreclosure proceedings provided for in said Declaration of trust.

6. The personal liability hereby authorized shall be a several liability and its creation and enforcement shall be several and shall not be dependent upon the execution of this agreement by all the persons, beneficiaries under said Declaration of Trust at the time such loans or advances are made by Bank of America National Trust and Savings Association, but shall be enforceable only against such signatory beneficiaries as are beneficiaries under said Declaration of trust, as shown on the records of said Bank of America National Trust and Savings Association, in the manner provided by said Declaration of Trust, and subsequent assignees and transferees or successors of any of the signatory beneficiaries, by the subscription to and execution of this agreement shall become parties hereto as if originally subscribed to and executed by them.

Exhibit A—(Continued)

In Witness Whereof the parties hereto have hereunto set their hands this 23rd day of June, 1937.

Signed by

F. E. SPRAGUE	1/28th
L. I. WEILL	2/28ths
BOYD KERN	1/28th
JOE SMITH	2/28ths
ELIZABETH S. SMITH	1/28th
Transferred to Stegeman	2/28ths
E. H. CLARE	
C. O. SPRAGUE	2/28ths
THOMAS HOPE	1/28th
J. M. KIRBY, M.D.	2/28ths
JOHN P. BROOKE	4/28ths
LOUIS WILLIAMS	1/28th
A. E. STEGEMAN	11/28ths

EXHIBIT B

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from January 1, 1939, to December 31, 1939.

3. Character of assessment or tax: Income and Excess Profits Taxes.

4. Amount of assessment, $1,856.54; dates of payment, February 21, 1940.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amounts as may be legally refundable) $1,856.54.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be legally filed expires, under section 322 of the Internal Revenue Code on March 15, 1943.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,

By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,

By W. D. WATSON,

Trust Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 3797 (a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooks, Boyd I. Kern,

Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of

certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers. [38]

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encum-

brances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [39]

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed an income and excess profits tax return for claimant for the calendar year 1939. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America, National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,

810 South Spring Street,

Los Angeles, California. [40]

EXHIBIT C

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,

County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from January 1, 1940, to December 31, 1940.

3. Character of assessment or tax: Income, Excess Profits and Defense Taxes.

4. Amount of assessment, $1,147.43; dates of payment, March 12, 1941.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $1,147.43.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be

legally filed expires, under section 322 of the Internal Revenue Code on March 15, 1944.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,

By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,

By W. D. WATSON,

Trust Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 3797 (a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth H. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeed by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed

concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes, filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers. [42]

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely per-

sonal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property

covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [43]

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed an income and excess profits tax return for claimant for the calendar year 1940. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as Trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,

810 South Spring Street,

Los Angeles, California. [44]

EXHIBIT D

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, No. S-4521, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on

behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from July 1, 1937, to June 30, 1938.

3. Character of assessment or tax: Capital Stock Tax.

4. Amount of assessment, $50.00; dates of payment, July 26, 1938.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $50.00.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be legally filed expires, under section 3313 of the Internal Revenue Code, on July 26, 1942.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,
By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,

By W. D. WATSON,
Trust Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 1001 (a) (2) of the Revenue Act of 1936 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of

the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following; holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers. [46]

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in addi-

tional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [47]

Bank of America National Trust and Savings Association, trustee, under said declaration of trust, duly filed a capital stock return for the year ending June 30, 1938. The said declaration of trust has not been revoked and said Bank of America Na-

tional Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street,
Los Angeles, California. [48]

EXHIBIT E

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the

kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from July 1, 1938, to June 30, 1939.

3. Character of assessment or tax: Capital Stock Tax.

4. Amount of assessment, $75.00; dates of payment, August 18, 1939.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $75.00

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be legally filed expires, under section 3313 of the Internal Revenue Code, on August 18, 1943.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,

By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,

By W. D. WATSON,

Trustee Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 901 (a) (2) of the Revenue Act of 1938 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Byod I. Kern,

Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes, filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in according with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of

the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of [50] Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the prin-

cipal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated [51] by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1939. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee,

and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street,
Los Angeles, California. [52]

EXHIBIT F

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,

County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from July 1, 1939, to June 30, 1940.

3. Character of assessment or tax: Capital Stock Tax.

4. Amount of assessment, $99.00; dates of payment, July 30, 1940.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $99.00.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be

legally filed expires, under section 3313 of the Internal Revenue Code, on July 30, 1944.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,

By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,

By W. D. WATSON,

Trust Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 3797 (a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937,

have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of [54] Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely per-

sonal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest, and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessment, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection wtih the

trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a [55] corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1940. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street,
Los Angeles, California. [56]

EXHIBIT G

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on

behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from July 1, 1940, to June 30, 1941.

3. Character of assessment or tax: Capital Stock Tax.

4. Amount of assessment, $187.50; dates of payment, 7-30-1941, $165.00; 1-9-42, $22.50.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $187.50.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be legally filed expires, under section 3313 of the Internal Revenue Code, on January 9, 1946.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,
By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,
By W. D. WATSON,
Trust Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 3797 (a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers. [58]

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several

beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [59]

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1941. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street,
Los Angeles, California. [60]

EXHIBIT H

Treasury Department
Washington

Aug. 10, 1942.

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue and Refer to IT:C1:CC:Rej. Homecrest Tract, c/o Bank of America National Trust & Savings Ass'n., Bakersfield, California.

In re: Claims for refund of $2,059.50 and $1,856.54 for the years 1938 and 1939.

Sirs:

Reference is made to revenue agent's report dated April 27, 1942 with respect to your tax liability. A copy of the report was forwarded to you, and

you were informed that the claim or claims for refund indicated above would be disallowed.

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

Respectfully,

GUY T. HELVERING,
Commissioner,

By T. MOONEY,
Deputy Commissioner. [61]

EXHIBIT I

Treasury Department
Washington

Oct. 1, 1942

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to IT:C1:CC:Rej. Homecrest Tract, Bank of America National Trust and Savings Association, Bakersfield, California.

In re: Claim for refund of $1,147.43 for the year of 1940.

Sirs:

Reference is made to claim or claims, referred to above, filed by you for the refund of income taxes.

By a Certificate of Overassessment you were advised of an allowance on Schedule of Overassess-

ment numbered IT-82516 for the taxable year referred to, and that to the extent your claim was disallowed in connection with such Certificate of Overassessment notice would be issued.

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance of your claim or claims, to the extent not previously allowed, is hereby given by registered mail.

Respectfully,
GUY T. HELVERING,
Commissioner,
By T. MOONEY
Deputy Commissioner. [62]

EXHIBIT J

Treasury Department
Washington

Sep. 19, 1942

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to MT:CST:JK 566782. Cls.CST-174195-6-7-8. Bank of America, Bakersfield, California.

Attention: Trust Department.

In re: Homecrest Tract.

Gentlemen:

Consideration has been given to your claims for the refund of capital stock tax paid in behalf of the

above-named trust for the taxable years 1938 to 1941, inclusive, amounting to $411.50.

The claims are based on the ground that Homecrest Tract is a trust and not an association taxable as a corporation.

The Bureau has ruled that the above trust is an association taxable as a corporation for income tax purposes. Since the status of the taxpayer for income tax purposes governs its status for capital stock tax purposes, the claims for refund on the ground that the taxpayer is not taxable as a corporation are, accordingly, rejected.

Respectfully,
GUY T. HELVERING,
Commissioner.
By D. S. BLISS,
Deputy Commissioner.

Registered mail.

cc-Los Angeles, California [63]

State of California,
County of Kern—ss.

R. C. Hinderliter being by me first duly sworn, deposes and says: that he is an officer, to-wit, Assistant Trust Officer of Bank of America National Trust and Savings Association, Trustee of Homecrest Tract, plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his informa-

tion or belief, and as to those matters that he believes it to be true. That he makes this verification for and on behalf of said Bank of America National Trust and Savings Association, Trustee, and as such officer thereof.

R. C. HINDERLITER.

Subscribed and sworn to before me this 7th day of August, 1944.

(Seal) (Signature of Notary Public is illegible.)

Notary Public in and for the County of Kern, State of California.

My commission expires January 18, 1946.

[Endorsed]: Filed Aug. 9, 1944. [64]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant, the United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and answers the complaint on file herein as follows:

FIRST CAUSE OF ACTION:

I.

Admits the allegations of Paragraphs I, II, V and IX of the complaint.

II.

Answering the allegations of Paragraph III, defendant denies that the taxes referred to were illegally assessed or collected. Admits the remaining allegations of Paragraph III. [65]

III.

Answering the allegations of Paragraph IV, defendant denies that the taxes referred to were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph IV.

IV.

Defendant denies each and every allegation of Paragraph VI.

V.

Defendant has no information or belief upon the allegations of Paragraph VIII and because of its lack of information and belief thereon, denies each and every allegation in Paragraph VIII.

VI.

Answering the allegations of Paragraph X, defendant admits that the taxes referred to in said paragraph have not been refunded to the plaintiff Denies all the remaining allegations of Paragraph XI.

VII.

Defendant has no information or belief upon the allegations of Paragraph XI, and because of its lack of information and belief thereon, denies each and every allegation of Paragraph XI.

SECOND CAUSE OF ACTION:

I.

Answering the allegations of Paragraph I, defendant refers to its answer to Paragraphs I, II, III, VIII and and XI of the first cause of action, and makes the same a part of its answer to the second cause of action, the same as if fully set forth herein. [66]

II.

Answering the allegations of Paragraph II, defendant denies that the taxes referred to were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Denies each and every allegation of Paragraph IV.

V.

Denies each and every allegation of Paragraph V.

VI.

Admits the allegations of Paragraph VI.

VII.

Defendant admits that the taxes referred to in Paragraph VII have not been refunded to the plaintiff. Denies all the remaining allegations of Paragraph VII.

THIRD CAUSE OF ACTION:

I.

Defendant refers to its answer to Paragraphs I,

II, III, VIII and XI of the first cause of action, and makes the same a part of its answer to the third cause of action, the same as if fully set forth herein.

II.

Defendant denies that the taxes referred to in Paragraph II, were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II.

III.

Admits the allegations of Paragraph III. [67]

IV.

Denies each and every allegation of Paragraphs IV and V.

V.

Admits the allegations of Paragraph VI.

VI.

Defendant admits that the taxes referred to in Paragraph VII have not been refunded to the plaintiff. Denies the remaining allegations of Paragraph VII.

FOURTH CAUSE OF ACTION:

I.

Defendant refers to its answer to Paragraphs I, II, III, VIII and XI of the first cause of action and makes said answer a part of its answer to the fourth cause of action, the same as if fully set forth herein.

II.

Defendant denies that the taxes referred to in Paragraph II were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Denies each and every allegation in Paragraph IV and V.

V.

Admits the allegations of Paragraph XI.

VI.

Defendant admits that on part of the taxes referred to in Paragraph VII have been refunded to the plaintiff. Denies the remaining allegations of Paragraph VII. [68]

FIFTH CAUSE OF ACTION:

I.

Defendant refers to its answer to Paragraphs I, II, III, VIII and XI of the first cause of action, and makes said answer a part of its answer to the fifth cause of action the same as if fully set forth herein.

II.

Defendant denies that the taxes referred to in Paragraph II were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Defendant denies each and every allegation in Paragraphs IV and V.

V.

Defendant admits the allegations of Paragraph VI.

VI.

Defendant admits that the taxes referred to in Paragraph VII have not been refunded to the plaintiff. Denies the remaining allegations of Paragraph VII.

SIXTH CAUSE OF ACTION:

I.

Defendant refers to its answer to Paragraphs I, II, III, VIII and XI of the first cause of action and makes the same a part of its answer to the sixth cause of action, the same as if fully set forth herein.

II.

Defendant denies that the taxes referred to in Paragraph II were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II. [69]

III.

Defendant admits the allegations of Paragraph III.

IV.

Defendant denies each and every allegation of Paragraphs IV and V.

V.

Defendant admits the allegations of Paragraph VI.

VI.

Defendant admits that no part of the taxes referred to in Paragraph VII have been refunded to the plaintiff. Denies the remaining allegations in Paragraph VII.

SEVENTH CAUSE OF ACTION:

I.

Defendant refers to its answer to Paragraphs I, II, III, VIII and XI of the first cause of action and makes said answer a part of its answer to the seventh cause of action, the same as if fully set forth herein.

II.

Defendant denies that the taxes referred to in Paragraph II were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II.

III.

Defendant admits the allegations of Paragraph III.

IV.

Defendant denies each and every allegation of Paragraphs IV and V.

V.

Defendant admits the allegations of Paragraph VI. [70]

VI.

Defendant admits that the taxes referred to in Paragraph VII have not been refunded to the plaintiff. Denies all the remaining allegations of Paragraph VII.

Wherefore defendant prays for judgment in its favor, together with costs, and for such other relief as may be just.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ ESTHER B. PHILLIPS,
Assistant United States Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Oct 6, 1944. [71]

[Title of District Court and Cause.]

AMENDED ANSWER

Now comes the defendant, the United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and for its amended answer to the complaint herein admits, alleges and denies:

I.

Defendant reaffirms the admissions, allegations

and denials contained in the answer heretofore filed in this action, as though fully set forth herein.

NEW MATTER

For a further defense and as new matter defendant alleges:

I.

That if plaintiff was not association taxable as a corporation during the calendar years 1938 to 1940, inclusive, then it was taxable as a pure trust.

II.

That plaintiff's income tax liability for the year 1938, based upon the assumption that it was taxable as a pure trust and not as an association taxable as a corporation, has been recomputed and amounts to the sum of $400.01. [73]

III.

That in the event it is held in this action that plaintiff was not an association taxable as a corporation the refund of 1938 income and excess profits taxes for which the plaintiff should have judgment should be the amount paid, $2059.50, reduced by the amount of $400.01 as an offset in favor of the defendant, or $1658.49 with interest thereon from the date of payment.

Wherefore defendant prays for judgment:

(1) That this action be dismissed with costs to the defendant;

(2) That if judgment be granted to the plain-

tiff for the recovery of income and excess profits taxes paid for the calendar year 1938, the amount should be $1658.49 with legal interest thereon from the date of payment of 1938 taxes by plaintiff, representing the total amount paid by plaintiff as income and excess profits taxes as an association taxable as a corporation, less $400.00, representing the amount of income tax liability of plaintiff for 1938 as a pure trust;

(3) For such other and further relief as to the Court may seem just and proper.

/s/ FRANK J. HENNESSY,
United States Attorney

/s/ A. K. LICKING
Assistant United States Attorney
Attorneys for Defendant

[Endorsed]: Filed May 19, 1945. [74]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed that the following facts are true.

I.

That Bank of America National Trust and Savings Association above named at all times mentioned was a national banking association, duly or-

ganized and existing under the laws of the United States, with its principal office located in the City and County of San Francisco, State of California, and in the Northern District of California, Southern Division.

That plaintiff has at all times borne true allegiance to the government of the United States of America, and has not in any way voluntarily aided, abetted or given encouragement to a rebellion against said government, nor at any time aided or abetted in any manner or given comfort to any sovereign or government that is, [75] or ever has been, at war with said United States.

II.

That on or about the 28th day of January, 1926, in the City of Bakersfield, County of Kern, State of California, Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague, and Elizabeth S. Smith, as Trustors, entered into a trust agreement with the Security Trust Company, a California corporation, as Trustee, and conveyed certain real property to said Trustee, and that on or about the 23rd day of June, 1937, said individuals executed a supplemental agreement. That true copies of said trust agreement and supplemental agreement, Exhibit A attached hereto, are hereby referred to, and made a part hereof, and introduced into evidence as plaintiff's Exhibit A,

and may be considered for all purposes as though they were the originals thereof. That Security Trust Company was succeeded in interest as Trustee of said trust on or about the 23rd day of June, 1937, by the above-named Bank of America National Trust and Savings Association, and the latter ever since has been, and still is, the duly constituted and acting Trustee of said trust and the real party in interest in this action.

III.

That at all times herein mentioned the above named defendant was, and now is, a sovereign body politic, by whom, through its agents, the taxes for which refund is here claimed were assessed and collected.

IV.

Plaintiff seeks to recover from defendant the sum of $5,474.97, together with interest as provided by law from the dates of payment thereof; said sum being made up as follows: [76]

(1) $2,059.50 income and excess profits taxes for the taxable year ending December 31, 1938;

(2) $1,856.54 income and excess profits taxes for the taxable year ending December 31, 1939;

(3) $1,147.43 income and defense taxes for the taxable year ending December 31, 1940;

(4) $50.00 capital stock tax for the taxable year ending June 30, 1938;

(5) $75.00 capital stock tax for the taxable year ending June 30, 1939;

(6) $99.00 capital stock tax for the taxable year ending June 30, 1940;

(7) $187.50 capital stock tax for the taxable year ending June 30, 1941.

V.

That on or about the 17th day of February, 1939, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income and excess-profits tax return for the taxable year ending December 31, 1938, on Form 1120A issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $2,000.94. That said tax was duly paid on or about the 17th day of February, 1939, in the manner provided by law. That thereafter a deficiency assessment of income tax for said taxable year was made against plaintiff in the amount of $54.31, which said deficiency assessment, together with interest in the amount of $4.25, was paid by plaintiff to defendant on or about the 8th day of July, 1940. That the total amount paid by plaintiff to defendant as income and excess-profits taxes for said taxable year, and interest thereon, as aforesaid, was the sum of $2,059.50. [77]

VII.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of In-

ternal Revenue for the Sixth District of California, its written claim for refund of income and excess-profits taxes in the amount of $2,059.50, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1938, according to the provisions of law in that regard [79] and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit B, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit B, and may be considered for all purposes as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated August 10, 1942, a true copy of which said notice is hereto attached, marked Exhibit I, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit I, and may be considered for all purposes as though it was the original.

VIII.

That no part of said sum of $2,059.50 collected from plaintiff by defendant as aforesaid as income and excess-profits taxes, and interest thereon, has been repaid or refunded to plaintiff.

IX.

That plaintiff is the sole and absolute owner of

the claims here sued upon, and has made no transfer or assignment of the same, or any part thereof, or of any interest therein. No action upon said claims here sued upon has been taken before Congress, or other of the departments of said government or any court other than the complaint filed in this court.

X.

That on or about the 21st day of February, 1940, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income and [80] excess-profits tax return for the taxable year ending December 31, 1939, on Form 1120A issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $1,894.14. That said tax was duly paid on or about the 21st day of February, 1940, in the manner provided by law. That thereafter an overassessment of income tax for said taxable year was made against said plaintiff in the amount of $37.60. That the total amount paid by plaintiff to defendant as income and excess-profits taxes for said taxable year, as aforesaid, was the sum of $1,856.54.

XI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of Cali-

fornia, its written claim for refund of income and excess-profits taxes in the amount of $1,856.54, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1939, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit C, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit C, and may be considered for all purposes as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated August 10, 1942, a true copy of which said notice is hereto attached, marked Exhibit I, referred to, and by this reference made a part hereof.

XII.

That no part of said sum of $1,856.54 collected from plaintiff by defendant as aforesaid as income and excess-profits [81] taxes has been repaid or refunded to plaintiff.

XIII.

That on or about the 12th day of March, 1941, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income, declared

value excess-profits and defense tax return for the taxable year ending December 31, 1940, on Form 1120 issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $1,147.43. That said tax was duly paid on or about the 12th day of March, 1941, in the manner provided by law. That thereafter an overassessment of income tax for said taxable year was made against plaintiff in the amount of $53.45, which said overassessment, together with interest thereon, remains unpaid. That the total amount paid by plaintiff to defendant as income and defense taxes for said taxable year was the sum of $1,147.43.

XIV.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of income, excess-profits and defense taxes in the amount of $1,147.43, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1940, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit D, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit D, and may be con-

sidered for all purposes as though it was the original. That plaintiff's claim [82] for refund was thereafter rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated October 1, 1942, a true copy of which said notice is hereto attached, marked Exhibit J, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit J, and may be considered for all purposes as though it was the original.

XV.

That no part of said sum of $1,147.43 collected from plaintiff by defendant as aforesaid as income and defense taxes has been repaid or refunded to plaintiff.

XVI.

That on or about the 26th day of July, 1938, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1938, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $50,000.00 was declared in accordance with the provisions of law, and the tax of $50.00 based upon said declared value was duly paid on or about the 26th day of July, 1938 in the manner provided by law by plaintiff to defendant.

XVII.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $50.00, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1938, according to the provisions of law in that regard and the regulations of the of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds [83] as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit E, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit E, and may be considered for all purposes as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a true copy of which said notice is hereto attached, marked Exhibit K, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit K, and may be considered for all purposes as though it was the original.

XVIII.

That no part of said sum of $50.00 collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff.

XIX.

That on or about the 18th day of August, 1939 plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1939, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $75,000.00 was declared in accordance with the provisions of law, and the tax of $75.00 based upon said declared value was duly paid on or about the 18th day of August, 1939 in the manner provided by law, by plaintiff to defendant.

XX.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $75.00, or such greater amount as may be legally [84] refundable, for said taxable year ending June 30, 1939, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit F, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit F, and may be considered for all pur-

poses as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a true copy of which said notice is hereto attached, marked Exhibit K, referred to, and by this reference made a part hereof.

XXI.

That no part of said sum of $75.00 collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff.

XXII.

That on or about the 30th day of July, 1940, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1940, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $90,000.00 was declared in accordance with the provisions of law, and the tax of $99.00 based upon said declared value was duly paid on or about the 30th day of July, 1940, in the manner provided by law, by plaintiff to defendant.

XXIII.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue through the Collector of Internal Revenue for the Sixth District [85] of Cali-

fornia, its written claim for refund of capital stock tax in the amount of $99.00, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1940, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit G, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit G, and may be considered for all purposes as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a true copy of which said notice is hereto attached, marked Exhibit K, referred to, and by this reference made a part hereof.

XXIV.

That no part of said sum of $99.00 collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff.

XXV.

That on or about the 30th day of July, 1941, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1941, on Form 707 issued by the Treasury Department of the United

States. That on said return a value of $150,000.00 was declared in accordance with the provisions of law, and the tax of $187.50 based upon said declared value was duly paid, in the manner provided by law, by plaintiff to defendant.

XXVI.

That on or about the 16th day of February, 1942, plaintiff [86] duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $187.50, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1941, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit H, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit H, and may be considered for all purposes as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a copy of which said notice is hereto attached, marked Exhibit K, referred to, and by this reference made a part hereof.

XXVII.

That no part of said sum of $187.50 collected

from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff.

XXVIII.

That attached to and made a part of plaintiff's original claim for refund for the year 1937 (Plaintiff's Exhibit B attached hereto) were a copy of the original trust agreement and a copy of the supplemental agreement (Plaintiff's Exhibit A attached hereto). Said copies of the original trust agreement and supplemental agreement so attached to said claim for refund were marked respectively "Exhibit A" and "Exhibit B," and are deemed to be so attached to said claim for refund (Exhibit B attached hereto) for all purposes herein. [87]

Dated: May 22nd, 1945.

LLOYD C. RAINEY and PAUL C. JONES.

By /s/ [Illegible]

Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ W. E. LICKING,

Assistant United States Attorney, Attorneys for Defendant. [88]

EXHIBIT "A"

Declaration of Trust, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth

Exhibit "A"—(Continued)

M. Legerton, F. E. Sprague, and Elizabeth S. Smith, Trustors, and the Security Trust Company, a corporation of Bakersfield, California, Trustee.

Witnesseth:

That Whereas the Trustors have caused or will cause to be executed and delivered to the Trustee, a deed conveying to it that certain real property situated in the County of Kern, State of California, and more particularly described as:

The Southwest quarter (SW¼) of Section Twelve (12) in Township Twenty-nine (29) South, Range Twenty-seven (27) East, M.D.B. & M., subject to the restrictions, reservations, easements and right of way of record and those also recited in the above-mentioned deed, and

Whereas no part of the consideration therefor was paid by said Trustee except as herein otherwise mentioned and provided for, but was paid by or on behalf of the beneficiaries hereinabove named, and

Whereas the parties hereto desire the Trustee to hold said property in trust for the uses and purposes herein provided,

Now, Therefore, it is expressly understood and agreed that said Trustee will hold said real property in trust under the terms and conditions and for the uses and purposes set forth in this declaration, as follows:—

Exhibit "A"—(Continued)

I.

(A Board of Managers consisting of three beneficiaries of this trust shall be vested with all the powers and shall be burdened with all the responsibilities provided therefor under this Declaration of Trust. Harry E. Hake, L. I. Weill and A. E. Stegeman shall constitute the first Board of Managers. Any two [89] members of said Board of Managers while in office shall have full power and authority to perform any act which the said Board are entitled to, or are required to perform hereunder. Each member of said Board shall hold office at the pleasure of the majority in interest of the beneficiaries of this trust. When the office of a member of the Board shall become vacant, upon his written resignation being filed with the Trustee; upon his removal from office by written memorandum signed by a majority in interest of the beneficiaries of the trust; by his death, or upon his ceasing to be a beneficiary of this trust, then the majority in interest of the beneficiaries may fill said office and file with the Trustee a memorandum signed by them, designating the member appointed to fill the vacancy.)

II.

The Trustee, hereinafter sometimes called the Payee, shall hold said property as security for the payment to it of the sum of Fourteen Thousand Dollars ($14,000.00) as evidenced by that certain promissory note signed by the Board of Mana-

Exhibit "A"—(Continued)

gers dated January 28, 1926, together with interest thereon as therein provided, and for the payment to said payee for such other loans and advances as may be made by the Payee during the continuance of this Trust to the then acting Board of Managers as evidenced by any promissory note or notes executed by two or more members of said Board, together with interest thereon as therein provided. Each Trustor agrees that he, his successors and assigns, shall be severally liable to the Payee for payment of the balance due on said note or notes in the proportion set opposite his name as beneficiary hereunder.

III.

Said Trustee shall subdivide and improve said real property in such manner as may be agreed upon between the Board of Managers and Trustee hereunder.

In Which Event a map of such new Subdivision shall be [90] prepared by the Board of Managers, executed and acknowledged by the Trustee, and filed for record in the office of the County Recorder of Kern County, California, said Trustee being hereby authorized to dedicate to public use all streets and alleys shown on the Map of such new subdivision.

To Sell said real property by lot or lots free of the lien of the Payee hereunder, upon such terms and conditions, to such purchasers, for such prices and payable in such manner as said Trustee may

Exhibit "A"—(Continued)

deem best, provided, however, that the sale prices of said property shall not be less than those agreed upon by said Trustee and the Board of Managers or the selling agent of said land acting under the provisions of Article IX of this Declaration, and

Provided further, however, that the selling price of any parcel of said property shall not be less than that portion of the amount then due the payee hereunder that the area of the parcel so sold bears to the then unsold parcels of all of said land and premises;

To Receive the proceeds arising from the sale of said property.

IV.

To Distribute the cash proceeds arising from the execution of said note or notes or from the sale of lot or lots hereunder as follows:

(1) To the payment of the costs, fees, and expenses of the Trustee hereunder.

(2) To the commission if any, of the authorized selling agent for making the sale of said property which is hereby fixed at ten per cent of the gross selling price;

Provided further, however, that in the event of a sale of any of said property by contract or on installments, there shall be deducted and paid to the agent out of the installments received only one-half of the installment toward said agent's [91] com-

Exhibit "A"—(Continued)

mission from time to time and until his commission has been fully paid.

(3) To the payment of the amount required to procure a release or releases of the lot or lots so sold from the lien of any encumbrance or encumbrances then of record against the same unless such lot or lots be sold subject thereto.

(4) To the payment of such bills approved by the Board of Managers for labor and material, if any, utilized for the improvement of the property covered hereby.

(5) To the Payee, to apply on the note or notes executed by the Board of Managers in connection with this Trust until such note or notes, together with interest and other advances due the Trustee hereunder have been fully paid.

(6) The balance thereof not otherwise required for the purpose of this Trust, to the Beneficiaries as their interest may appear.

V.

The Beneficiaries of this trust at the time of the creation of this trust and the ratio or shares of their respective interests are as follows:

Harry E. Hake	2/28ths
L. I. Weill	2/28ths
A. E. Stegeman	7/28ths
Anita Clare	2/28ths
C. O. Sprague	2/28ths
John P. Brook	2/28ths

Exhibit "A"—(Continued)

Boyd I. Kern	1/28th
Thomas Hope	1/28th
Joe Smith	2/28ths
J. M. Kirby	2/28ths
K. S. McKee	2/28ths
Ruth M. Legerton	1/28th
F. E. Sprague	1/28th
Elizabeth S. Smith	1/28th

VI.

No Sale or Transfer of any beneficial interest hereunder shall be valid or be binding on said trustee until an executed original of the assignment or other instrument evidencing such sale or transfer has been filed with said Trustee, excepting only where such interest may pass or be transferred by Decree or Order of Court, and then only upon satisfactory proof of the regularity and validity of the proceedings in such matter being presented to said Trustee.

If the Property herein described or any portion thereof, or the proceeds or avails thereof, become liable for the payment of any inheritance, income, or other tax, said Trustee is authorized to withhold and pay such tax out of any moneys in its hands for the account of the person whose interests hereunder are so liable, unless such tax shall have been paid by such person or someone else in his behalf.

Provided, if any such tax be not so paid and there are not sufficient moneys in the hands of said trustee under this Trust to pay the same, the Trus-

Exhibit "A"—(Continued)

tee may, at its option (but shall not be obligated so to do), advance a sufficient sum to pay such tax, which advancement, with interest thereon at the rate of seven per cent (7%) per annum from date of advancement to date of repayment, shall constitute a first lien on said property covered hereby, subject only to the incumbrances hereinbefore described.

All of said Trustors hereunder do, severally, well and truly bind themselves to pay, when due, their respective proportions of the principal and interest of all liens, and encumbrances against the property covered hereby, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of said property or the title thereof, and the costs, charges and expenses of this trust, [93] together with all other sums or amounts properly payable by them in connection with this trust, the property herein described or the beneficial interests hereunder.

Said Trustee shall not be required to attend to or procure any insurance upon any building upon any property covered hereby, or to pay or attend to the payment of principal or interest of any debt or incumbrance, or any taxes or assessments levied or assessed against the property covered hereby so long as this Trust shall continue, or to collect or disburse any rentals thereof; but all such services shall be performed and the expenses thereof borne by said Trustors, their successors and assigns.

Exhibit "A"—(Continued)

Nor shall said Trustee be required to commence or defend any suit or suits with respect to said property covered hereby unless request so to do in writing by said Trustors or Payees or Beneficiaries hereunder, or either of them, accompanied by a sum of money sufficient in the judgment of said Trustee, to cover all costs and charges in connection therewith.

It Is Distinctly Understood that all deeds, contracts of sale and other instruments affecting property covered hereby shall be executed solely by said Trustee;

And that all moneys in connection with this Trust (excepting only rentals as hereinbefore provided) shall be paid to said Trustee for distribution in accordance with the provisions herein set forth.

VII.

If Default is made in the payment of said debts to the Trustee or Payee secured hereby, or either or any of them, or any installment of interest on either or any of them, then said Trustee or payee hereunder may declare all sums owing to it and secured hereby immediately due and payable, and shall execute and deliver and record in the office of the Recorder of the County in which the property covered hereby or some part thereof is situated, a notice of such default and breach and of election to cause said [94] property to be sold to satisfy said obligation.

Exhibit "A"—(Continued)

And after three (3) months shall have elapsed following said recordation of said notice, said Trustee—without demand on the Beneficiaries or Payee hereunder or any other person—shall sell the property then covered hereby in such parcels and at such times and places as it shall deem best to accomplish the objects of these trusts, having first given notice of the time and place of such sale or sales, in the manner and for a time not less than that required by law for sales of real property upon execution.

The Trustee, from time to time, may postpone the sale of all or any portion of said property by publication, prior to the date of sale so advertised, a notice of postponement in the same newspaper or newspapers in which the original notice of sale was published, or by public announcement thereof at the time and place of sale so advertised or postponed.

Such sale or sales shall be made in the following manner, namely:

At the time and place of sale fixed as hereinbefore provided the Trustee may sell the property so advertised or any portion thereof either en masse or in separate parcels at its sole discretion, at public auction, to the highest bidder for cash in gold coin of the United States, and, after any such sale and due payment made, shall execute and deliver to the purchaser or purchasers, a deed or deeds conveying the property so sold to such pur-

Exhibit "A"—(Continued)

chaser or purchasers but without covenant or warranty, express or implied, regarding the title or incumbrances, whereupon such purchaser or purchasers shall be let into immediate possession of such property, and all other persons in possession thereof shall be deemed to be tenants at sufferance; and the recitals in each such deed, of any facts or matters affecting the regularity or validity of such sale, shall be conclusive proof of the truthfulness of such recitals, and such deed shall be conclusive against all persons as to all matters recited therein; and the receipt [95] for the purchase money contained in any deed executed to a purchaser as aforesaid, shall be sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money according to the trusts herein contained or otherwise.

The Trustee or Payee or any person on its behalf, or any other person, may purchase at such sale.

Distribution of the proceeds, received by said Trustee, arising from such sale or sales, shall be made by it as follows:—

1st: To the payment of all expenses of such sale, including posting and advertising, and costs, fees, charges and expenses of this Trust; also Trustee's fee for making such sale hereby fixed at Two Hundred Dollars ($200.00) in said Gold coin; which said amounts shall all become due and pay-

Exhibit "A"—(Continued)

able upon receipt by said Trustee of written declaration of default and demand aforesaid.

2nd: To the payment of all sums which may have been advanced by said Trustee for the preservation, maintenance or protection of the property covered hereby, the title thereto, or any beneficial interest hereunder, and not repaid, with accrued interest thereon.

3rd: To the payment to the Payee of all sums then due said Payee hereunder with accrued interest thereon.

4th: And the balance, (if any) to the person or persons legally entitled thereto.

VIII.

This Trust shall not cease or terminate in any event until all of the costs, fees, expenses, liabilities and advances with interest of said Trustee hereunder shall have been fully paid.

IX.

For a period of one year from date and thereafter until the Trustee is otherwise notified in writing by the Board of [96] Managers, Harry E. Hake is hereby designated as the selling agent of said land and when he shall request the Trustee in writing to make a sale of any lot or lots in said subdivision to such person, for cash or on such terms as shall be designated in said order, the Trustee shall proceed to sell by conveyance, or contract for the

sale by agreement of such lots in accordance with such request. All such conveyances or agreements shall be subject to all of the restrictions, reservations, easements and rights of way of record.

X.

The power is hereby vested in the beneficiaries and said Trustee does hereby assent to the express power and right vested in said beneficiaries to revoke this trust in whole or in part at any time after one year from the date hereof by notice of revocation in writing addressed and delivered to said Trustee at least sixty days prior to such revocation taking effect, provided, however, that both the payee and the Trustee shall have been repaid all loans, advances and all other sums of money whatsoever due said Trustee and said payee under this Declaration and under the notes, obligations and other indebtedness hereby secured.

Upon the termination of this trust at the expiration of said sixty days and the repayment of all of said loans, advances and other obligations due the payee and the Trustee hereunder the Trustee shall transfer, convey and deliver to the then beneficiaries hereunder as their interest may appear, the title to all of the said land and premises then vested in the Trustee hereunder, subject, however, to the then existing contracts of sale, agreements, leases, tax liens and assessments, encumbrances and other obligations incurred in reference thereto.

Exhibit "A"—(Continued)

XI.

The costs, fees and expenses of the Trustee hereunder are hereby fixed as follows:

1st: Usual fees for preparing, executing, and recording instruments, and issuing Guarantee showing title to the real [97] property covered hereby vested in said Trustee; together with expense of internal revenue or such other tax as may be imposed by law upon all instruments necessary for execution hereunder; also proper compensation for preparing income and other tax reports required by law.

2nd: One Hundred Dollars ($100.00) for the drawing and execution of this Declaration and the acceptance of this trust. Should this trust not terminate within one year from the date hereof, then said Trustee shall receive an additional sum of Twenty-five dollars ($25.00) for each year, or fractional year, thereafter.

3rd: One per cent (1%) of the cash consideration paid upon the outright purchase of any property covered hereby or of the initial or down payment made by any purchaser under contract or agreement of sale; and 2% of the installments of principal and interest collected under agreements or contract or sale on any property covered by this Declaration.

4th: And reasonable compensation for any service rendered by said Trustee in the execution of this

Exhibit "A"—(Continued)

trust for which the costs, fees and expenses are not herein provided.

5th: The sum of Twenty-five Dollars ($25.00) for the final closing, distributing and settlement of this trust.

In Witness Whereof the parties hereto have hereunto set their hands this 28th day of January, 1926, at Bakersfield, California.

Harry E. Hake	F. F. Sprague
L. I. Weill	Joe Smith
A. E. Stegeman	J. M. Kirby, M.D.
Anita Clare	K. S. McKee
C. O. Sprague	Elizabeth S. Smith
John P. Brooke	Thomas Hope
Boyd Kern	Ruth M. Legerton

SECURITY TRUST COMPANY,
A CORPORATION,
As Trustor.

By C. C. LEGERTON,
Its Assistant Trust Officer. [98]

EXHIBIT "B"

HOMECREST SUPPLEMENTAL AGREEMENT

Whereas, by agreement dated on or about the 28 day of January, 1926, by and between Harry E. Hake, L. E. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd T. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, as Trustors, and Security Trust Company, a corporation of Bakersfield, California, as Trustee, a Declaration of Trust was made whereby said Security Trust Company acknowledged the holding in trust upon the terms and conditions therein specified, of the following real property situate in the County of Kern, State of California, particularly described as follows, to-wit:

The Southwest Quarter (SW¼) of Section Twelve (12), in Township Twenty-nine (29) South, Range Twenty-seven (27) East, M.D.B. & M.;

And Whereas, Bank of America National Trust and Savings Association is now the successor to said Security Trust Company, and as such successor has succeeded to all the rights, powers, duties and liabilities conferred or imposed upon said Security Trust Company under the terms of said Declaration of Trust; and

Whereas, Paragraph II of said Declaration of Trust provides as follows:

"The Trustee, hereinafter sometimes called the

Payee, shall hold said property as Security for the payment to it of the sum of Fourteen Thousand dollars ($14,000.00) as evidenced by that certain promissory note signed by the Board of Managers dated January 28, 1926, together with interest thereon as therein provided, and for the payment to said Payee for such other loans and advances as may be made by the Payee during the continuance of this [99] Trust to the then acting Board of Managers as evidenced by any promissory note or notes executed by two or more members of said Board, together with interest thereon as therein provided. Each Trustor agrees that he, his successors and assigns, shall be severally liable to the Payee for payment of the balance due on said note or notes in the proportion set opposite his name as beneficiary hereunder."

And Whereas, said Bank of America National Trust and Savings Association may, pursuant to the provisions of said Paragraph II, make other loans and advances under said Declaration of Trust evidenced by promissory note or notes executed by the Board of Managers as created by said Declaration of Trust, upon the condition, however, that the beneficiaries under said Declaration of Trust shall agree to become personally liable to said Bank of America National Trust and Savings Association for such loans or advances in the proportion that the interest of each beneficiary bears to the total of the beneficial interests held by said beneficiaries.

Now, Therefore, it is hereby agreed as follows, to-wit:

1. That said Bank of America National Trust and Savings Association may make such loans and advances, as in its discretion it may determine, to said Board of Managers, to be evidenced by promissory note or notes executed by said Board of Managers.

2. That the repayment of said loans or advances shall be secured by said Declaration of Trust and enforced according to the terms and conditions set forth in said Declaration of Trust.

3. That the said Board of Managers may execute a promissory note or notes evidencing said loans or advances and specifying the time and manner of repayment, and the interest thereon, and that said notes may be renewed from time to time as agreed upon [100] between Bank of America National Trust and Savings Association, and said Board of Managers.

4. That each of the undersigned being present beneficiaries under said declaration of trust shall be personally liable to said Bank of America National Trust and Savings Association for said loans or advances to the extent of the fractional interest of each beneficiary as set opposite the signature of each beneficiary on this agreement, and that the extent and manner of such liability shall be determined by the promissory note or notes executed by said Board of Managers to evidence said loans or advances or any renewals thereof.

5. That said personal liability of the undersigned beneficiaries may be enforced by said Bank of America National Trust and Savings Association without resort to the foreclosure proceedings provided for in said Declaration of Trust.

6. The personal liability hereby authorized shall be a several liability and its creation and enforcement shall be several and shall not be dependent upon the execution of this agreement by all the persons, beneficiaries under said Declaration of Trust at the time such loans or advances are made by Bank of America National Trust and Savings Association, but shall be enforceable only against such signatory beneficiaries as are beneficiaries under said Declaration of Trust, as shown on the records of said Bank of America National Trust and Savings Association, in the manner provided by said Declaration of Trust, and subsequent assignees and transferees or successors of any of the signatory beneficiaries, by the subscription to and execution of this agreement shall become parties hereto as if originally subscribed to and executed by them.

In Witness Whereof the parties hereto have hereunto set their hands this 23rd day of June, 1937.

Signed by:

F. E. Sprague	1/28th
L. I. Weill	2/28ths
Boyd Kern	1/28th
Joe Smith	2/28ths
Elizabeth S. Smith	1/28th
Transferred to Stegeman	

E. H. Clare	2/28ths
C. O. Sprague	2/28ths
Thomas Hope	1/28th
J. M. Kirby, M.D.	2/28ths
John P. Brooke	4/28ths
Louis Williams	1/28th
A. E. Stegeman	11/28ths

(Here follows Exhibit B-2, Claim, which is a part of Exhibit A in the Complaint, and is reproduced at page 24 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 901(a)(2) of the Revenue Act of 1938 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement date the 23rd day of June, 1937, are attached hereto, marked "Exhibit A" and "Exhibit B," respectively, referred to, and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property [104] conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest, and therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deal of trust to secure the repayment of a loan made by the trustee, and since the characteristics of claimant, as indicated by the

above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [175]

Bank of America National Trust and Savings Association, trustee, under said declaration of trust, duly filed an income and excess-profits tax return for claimant for the calendar year 1938. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street, Los Angeles, California. [106]

(Here follows Exhibit C-1, Claim, which is a part of Exhibit B in the Complaint, and is reproduced at page 48 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 3797(a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B" respectively, and attached to a claim for refund of income and excess-profits taxes filed by claimant for the period January 1, 1938 to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advance as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to

portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making [108] disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries

did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the [109] trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed an income and excess-profits tax return for claimant for the calendar year 1939. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant

from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY
810 South Spring Street,
Los Angeles, California

(Here follows Exhibit D-1, Claim, which is a part of Exhibit C in the Complaint, and is reproduced at page 54 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 3797(a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B" respectively, and attached to a claim for refund of income and excess-profits taxes, filed

by claimant for the period January 1, 1938 to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said [112] declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the

title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the re-

payment of a loan made by the trustee and since the characteristics of claimant, as indicated by [113] the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed an income and excess-profits tax return for the calendar year 1940. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as Trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY
810 South Spring Street
Los Angeles, California

(Here follows Exhibit E-1, Claim, which is a part of Exhibit D of the Complaint, and is reproduced at page 60 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 1001(a) (2) of

the Revenue Act of 1936 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B" respectively, and attached to a claim for refund of income and excess-profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following:

holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of [116] trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the bene-

ficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by [117] the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1938. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY
810 South Spring Street
Los Angeles, California

(Here follows Exhibit F-1, Claim, which is a part of Exhibit E of the Complaint, and is reproduced at page 65 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 901(a) (2) of the Revenue Act of 1938 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd T. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed

concurrently herewith, marked "Exhibit A" and "Exhibit B" respectively, and attached to a claim for refund of income and excess-profits taxes, filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyance of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the [120] said declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revoca-

tion of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by [121] trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1939. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY

810 South Spring Street

Los Angeles, California

(Here follows Exhibit G-1, Claim, which is a part of Exhibit F in the Complaint, and is reproduced at page 71 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 3797(a)(3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B," respectively, and attached to a claim for refund of income and excess-profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be

made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said [124] declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not or-

ganize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest, and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by [125] the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year

ending June 30, 1940. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated as Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street, Los Angeles, California. [126]

(Here follows Exhibit H-1, Claim, which is a part of Exhibit G in the Complaint, and is reproduced at page 77 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 3797(a)(3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subse-

quently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B," respectively, and attached to a claim for refund of income and excess-profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making [128] disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs,

charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of [129] a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1941. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 Suth Spring, Street, Los Angeles, California. [130]

EXHIBIT I

Treasury Department
Washington

August 10, 1942.

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue and Refer to IT:C1:CC:Rej Homecrest Tract, c/o Bank of America National Trust & Savings Ass'n., Bakersfield, California.

In re: Claims for refund of $2,059.50 and $1,856.54. For the years 1938 and 1939.

Sirs:

Reference is made to revenue agent's report dated April 27, 1942, with respect to your tax liability. A copy of the report was forwarded to you, and you were informed that the claim or claims for refund indicated above would be disallowed.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

Respectfully,
GUY T. HELVERING,
Commissioner.

By T. MOONEY,
Deputy Commissioner. [131]

EXHIBIT J

Treasury Department
Washington

Oct. 1, 1942.

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to IT:C1:CC:Rej Homecrest Tract Bank of America, National Trust and Savings Association, Bakersfield, California.

In re: Claim for refund of $1,147.43 for the year 1940.

Sirs:

Reference is made to claim or claims, referred to above, filed by you for the refund of income taxes.

By a certificate of Overassessment you were advised of an allowance on Schedule of Overassessments numbered IT-82516 for the taxable year referred to, and that to the extent your claim was disallowed in connection with such Certificate of Overassessment notice would be issued.

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance of your claim or claims, to the extent not previously allowed, is hereby given by registered mail.

Respectfully,
GUY T. HELVERING,
Commissioner.
By T. MOONEY,
Deputy Commissioner. [132]

EXHIBIT K

Treasury Department
Washington

Sept. 19, 1942.

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue and refer to MT:CST:JK 566782 Cls. CST-174195-6-7-8, Bank of America, Bakersfield, California.

Attention: Trust Department.

In re: Homecrest Tract.

Gentlemen:

Consideration has been given to your claims for the refund of capital stock tax paid in behalf of the above-named trust for the taxable years 1938 to 1941, inclusive, amounting to $411.50.

The claims are based on the ground that Homecrest Tract is a trust and not an association taxable as a corporation.

The Bureau has ruled that the above trust is an association taxable as a corporation for income tax purposes. Since the status of the taxpayer for income tax purposes governs its status for capital stock tax purposes, the claims for refund on the ground that the taxpayer is not taxable as a corporation are, accordingly, rejected.

Respectfully,

GUY T. HELVERING,
Commissioner.

By D. S. Bliss,
Deputy Commissioner.

Registered Mail.

cc-Los Angeles, California. [132½]

In the Southern Division of the United States District Court, in and for the Northern District of California.

Before: Hon. Michael J. Roche, Judge.

No. 23,580-R

HOMECREST TRACT, BANK OF AMERICA, NATIONAL TRUST & SAVINGS ASSOCIATION, Trustee,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Tuesday, May 22, 1945
1:00 o'clock p.m.

Counsel Appearing: For Plaintiff: J. E. Blum, Esq., 810 So. Spring St., Los Angeles, Calif. For Defendant: William E. Licking, Esq., Assistant United States Attorney.

The Clerk: Homecrest Tract vs. United States.

Mr. Blum: Ready.

Mr. Licking: Ready.

The Court: Proceed.

Mr. Blum: This is an action for the recovery of income excess tax on the capital stock of the plaintiff, collected from plaintiff by defendant, on the theory the trust involved in this action had the attributes of a corporation, and was an association taxable

* Page numbering appearing at foot of page of original Reporter's Transcript.

as a corporation. It is the plaintiff's contention that it contains none of the attributes which the Supreme Court laid down in Morrissey v. Commissioner, 296 U. S., and companion cases, wherein the Supreme Court laid down five principles in determining whether a group was an association taxable as a corporation. I assume that the case will probably be submitted on briefs, and I shan't go into the five points which the Supreme Court laid down. They will be taken up at length in the briefs.

It is the contention of the plaintiff that they contain but one of those attributes. That is one that is not common only to trusts. These facts, in the main, have been stipulated—I believe the stipulation is to be handed to the Court.

Mr. Licking: Yes, I will hand it at this time.

Mr. Blum: The Court will note in going through the stipulation that we have attached to the stipulation all of the exhibits which are material in this action, at least copies of them, and have stipulated they may be treated for all purposes of the action as the originals. The defendant has filed as of Saturday, I believe, a new matter, an amended answer.

Mr. Licking: I understand it is stipulated at this time that the amendment to the answer which sets up a setoff or counterclaim may be filed. [134]

Mr. Blum: Correct.

Mr. Licking: It is further stipulated on the part of counsel that the new matter set up in the amendment to the answer is deemed to have been

denied, as though a formal pleading were filed with the court to that effect.

Mr. Blum: Except for paragraph VI., which is contained in the stipulation and which is deleted and——

Mr. Licking: Paragraph VI., which appears on pages 4 and 5, your Honor; that was deleted.

The Court: It is crossed out here.

Mr. Licking: Yes. That was deleted by agreement of counsel.

Mr. Blum: The only testimony involved in the case will be a few questions to cover the matters which were set up in the paragraph VI.

Mr. Licking: I take it it will be further stipulated, to complete the record, that a recomputation of the taxpayer's income tax liability for the taxable years 1938 to 1940, inclusive, based on the assumption that plaintiff was properly taxable as a pure trust and not as an association taxable as a corporation, disclosed income tax liability for the year 1938 in the amount of $400.01, no income tax liability for the years 1939 and 1940.

Briefly, your Honor, the new matter set up in the amended answer is this: Counsel has explained the theory on which the [135] tax was assessed, that is, that the trust was an association which was taxable as a corporation under the provisions of the Internal Revenue statutes, and the new matter set up, briefly, was that if the Court should hold that it was a trust, and a taxable trust, that for the year of 1938 there will be an offset in the amount of $400.01. There is some legal question to the ex-

tent even if it is a trust it is a taxable trust, and that we can handle in the briefs.

Mr. Blum: We claim it is not taxable as a trust under section 166, but as to the point of the $400.01, if the Court decides the trust should have paid a tax as a pure trust, then the amount of tax set up is correct, which would mean it would have to be paid for the year 1938 in that amount.

The Court: I would have to conclude it was a trust.

Mr. Blum: You would have to conclude it was a trust and that it was taxable as a trust, and not exempt under the section 166, which we will later set up in our brief.

The Court: Did this association have any tax returns heretofore?

Mr. Blum: It filed a fiduciary return for the years prior and as of the year 1937 the trustee received a letter from the Commissioner that henceforth they were considered to be an association taxable as a trust, and from that date on they filed regular returns, and for the year 1938 they did not file a fiduciary return, which had it been filed would have [136] shown an income of, roughly, $11,000, and distribution of $4200, which means that unless the entire income is allocated to the beneficiaries, whether or not distributed and taxable to the beneficiaries, it should have paid a tax, the trust should have paid a tax. Our contention is it was not taxable as a trust, even as a pure trust. Anything further?

Mr. Licking: Nothing further.

R. C. HINDERLITER,

called as a witness by plaintiff; sworn.

The Clerk: Will you state your name to the Court?

A. R. C. Hinderliter.

Direct Examination

By Mr. Blum:

Q. What is your business or occupation, Mr. Hinderliter?

A. I am an assistant trust officer of the Bank of America in Bakersfield.

The Court: Where?

A. Bakersfield.

Mr. Blum: Q. As such, have you had any connection with trust SU142, commonly referred to, I believe, in your trust department, as the Homecrest Tract?

A. I have.

Q. Did you have charge of that trust as the trust officer? A. Yes.

Mr. Licking: That is the trust set out in Exhibit A?

Mr. Blum: That is the trust involved in this action set up as Plaintiff's Exhibit A?

A. Yes. [137]

Q. Did the trust have a name as an entity?

Mr. Licking: It seems to me that that is objectionable, on the ground it calls probably for a mixed matter of law, that is, as to its being an entity.

Mr. Blum: Q. Did the trust have a name?

(Testimony of R. C. Hinderliter.)

A. The one that we gave it as of our number, our identifying name only.

Q. You mean by that the name Homecrest Tract? A. That's right.

Q. Were there any contracts, bills of sale, or other instruments made in the name of the trust as the Homecrest Tract? A. No.

Q. Where were the bills of sale or deeds made?

A. They were issued and signed by the bank; just the bank, without any trustee designation, at all.

Q. Did this trust have any officers, with the exception of the board of managers, if it might be so construed? A. No.

Mr. Licking: In other words, you mean it didn't have any officers other than those set up in Exhibit A?

Mr. Blum: Yes.

The Witness: A. No.

Q. Did the board of managers ever organize?

A. No.

Mr. Licking: That is hearsay. I move it be stricken. He was not a member of the board of managers.

Mr. Blum: Q. Do you, as trustee, and in your capacity as being in charge of this trust, know of your own knowledge whether the board of managers ever organized?

Mr. Licking: How can he? [138]

Mr. Blum: I am asking him.

(Testimony of R. C. Hinderliter.)

Mr. Licking: It calls for a matter that is obviously immaterial.

Mr. Blum: I asked him if he knew of his own knowledge whether it ever organized or not.

The Witness: They have not, to my knowledge.

Mr. Blum: Q. Well, do you know—will you say whether you know?

A. No, I couldn't say.

Q. Were any shares or certificates or other evidence of interest in the trust ever issued?

A. No.

Mr. Licking: That answer is of your own knowledge, you know that to be a fact? A. Yes.

Mr. Lieking: I don't want to clutter the record——

The Witness: That's right.

Mr. Blum: Q. Do you know of your own knowledge whether the trust had a seal?

A. No.

Q. You don't know of your own knowledge, or you do do know?

A. I know there was no seal.

Q. Did the trust have bylaws? A. No.

Q. Did the trust have any minute books or stock ledgers? A. No.

Q. Or stock certificate books? A. No.

Q. Or any books in lieu of any such books?

A. No.

Q. Did the trust have an office? A. No.

Q. Did it operate right from your trust department of the bank? A. That's right. [139]

(Testimony of R. C. Hinderliter.)

Q. Was that the place of operation?

A. Yes.

Q. Did the trust have any employees other than the board of managers and the selling agents?

A. No.

Q. Did the trustee, the Bank of America, ever seek advice or instructions from the beneficiaries with respect to their actions?

Mr. Licking: That calls for hearsay, and I object on that ground.

Mr. Blum: He was the one in charge of the trust.

Mr. Licking: Well, if he is——

Mr. Blum: Q. Do you know, or did you, as being the trust officer in charge of the trust, ever seek advice or instruction from the beneficiaries with respect to any matters concerning the trust?

A. Yes.

Q. Do you know whether the Bank of America would have loaned the trustors of this trust the money which is evidenced by the promissory note which this trust secures, without the security of the deed of trust?

Mr. Licking: That question we object to on the first ground it is argumentative, and secondly it calls for his conclusion as to what the Bank of America would have done.

The Court: Sustained.

Mr. Blum: Q. Was there any discussion between the trustee, and more particularly you, as representative of the trustee, and the trustors

(Testimony of R. C. Hinderliter.)

when the trust was drawn, as to the powers [140] of the trustee with respect to the trustee signing the contracts for the sale of the property, and of the deeds.

Mr. Licking: I object to that as calling for hearsay; secondly, that the trust indenture explains itself better than anything else as to any agreement between the representative of the bank and the trustors. It would be immaterial in the case and inadmissible.

Mr. Blum: I am not asking for the agreement they had. I asked if there was any discussion at the time the trust was created.

Mr. Licking: It is immaterial.

Mr. Blum: In other words, a trustor does not just say, "You go out and draw a trust and hand it to me and I will accept it." I am leading up to a particular power, one of the powers which appeared in the trust.

The Court: Pardon me just a moment. Did you, yourself, draw this trust?

The Witness: A. I did not.

Mr. Blum: Q. Did you have any discussion with the trustors with respect to the drawing of the trust?

Mr. Licking: I object to that as immaterial, and hearsay. The trust agreement speaks for itself.

Mr. Blum: I think we have the right to show the circumstances leading up to the trust. We cannot show any agreement at variance—this is

(Testimony of R. C. Hinderliter.)

not parole evidence. We can show the [141] reason why a certain power was put into the trust.

The Court: The trust will have to speak for itself. Any conversation with any of the trustors or the trustee would not vary the terms of this written instrument.

Mr. Blum: It is not a question of varying the terms, your Honor. It is to show the reason why the terms are as they are. We have a right to show the intent and the reason, I think, behind the powers. We are not attempting to vitiate any of the powers.

The Court: Is there any question about what was intended here?

Mr. Blum: I don't think it has been brought up at all by Mr. Licking.

Mr. Licking: "To convey real property to trustee.

"2. To execute a supplemental agreement, two copies of the proposed agreement"——

It seems to me they speak pretty well for themselves, your Honor. I repeat my objection that the document, itself, is not ambiguous. I don't know any variance in it. It is not ambiguous. If there is any phrase that is ambiguous I might be disposed to agree with counsel that parole evidence might be resorted to to explain any ambiguity, but to explain why the trust was drawn, the trust speaks for itself.

Mr. Blum: Apparently I have not made myself clear. The trust states why it was formed. The

(Testimony of R. C. Hinderliter.)

trust says this trust [142] was formed as security for a promissory note of even date executed by the trustors in favor of the trustee, or words substantially to that effect. However, there was one power in the trust which provided that the trustee shall have the right to sign contracts of sale for this property, or portions of it. I think I have the right to show why that power was put in. We are not trying to say the trustee didn't have it. We are not trying to say there is any variation in it, but I do think we have a right to show why a power was put in.

The Court: What is the purpose of the offer?

Mr. Blum: The purpose of the offer is to show it would have been very cumbersome for ten or twelve people to have to sign every bill of sale for a piece of property. It would have broken down the confidence of anyone who wanted to buy a piece of property, that they would have to be able to get a deed from ten or twelve people who might be scattered to the four corners of the United States.

Mr. Licking: I will admit that is a good argument, but counsel is supposed to make that argument in his brief, or to the court at a later date. An additional ground of objection is he is seeking to prepare an argument by the testimony of a witness here as to a reason——

Mr. Blum: It is not a matter of argument. The fact is there were discussions at the time of the creation of the trust as to the putting in of this power.

The Court: Assuming he had a discussion with

(Testimony of R. C. Hinderliter.)

one of these trustors, how would that vary the terms of this written instrument, itself?

Mr. Blum: It wouldn't vary the terms, at all, your Honor. It would simply, as we see it, add to plaintiff's contention that the trust is not taxable as an association, and the cases have permitted that to come in, as shown by the decision in A. A. Lewis vs. The Commissioner, where the Supreme Court permitted evidence to go in to show why the trust was formed.

Mr. Licking: But this trust shows why it was formed.

The Court: So he may have a record, I will allow the testimony to go in subject to your motion to strike, and over your objection.

Mr. Blum: Very well.

Q. Were any such conversations had, Mr. Hinderliter, with respect to the giving of the power to the trustee to sign contracts of sale?

A. I cannot answer that, because I was not the trust officer at that time.

Mr. Blum: No further questions, from this witness.

Cross Examination

Mr. Licking: Q. When you say the trust had no office, you mean it had no office other than the bank? A. That's right.

Q. It used the bank for meetings?

A. No; we had no meeting that I know of.

Q. It had no meetings?

A. That's right. [144]

(Testimony of R. C. Hinderliter.)

Q. So far as you know?

A. That's right.

Mr. Licking: I think that is all.

LAWRENCE I. WEILL,

called as a witness by the plaintiff sworn.

The Clerk: Will you state your name?

A. Lawrence I. Weill.

Direct Examination

Mr. Blum: Q. Mr. Weill, are you the L. I. Weill named as one of the trustors and one of the beneficiaries and an original member of the board of managers in Plaintiff's Exhibit A, being the trust? A. I am.

Q. There set out as L. I. Weill? A. Yes.

Q. Did any conversation occur with a representative of the Bank of America at the time of the creation of this trust at which you were present, and other trustors were present, with respect to the placing in the bank of the power that the trustee might sign contracts of sale for the sale of any of the property?

Mr. Licking: That is objected to as immaterial.

Mr. Blum: Well, it goes in on the same understanding—I am willing to stipulate it goes in on the same ruling the court made before.

The Court: I will allow it to come in subject to a motion to strike, and I will overrule the objection, so you may have a record.

(Testimony of Lawrence I. Weill.)

The Witness: I cannot recall any specific meeting at which [145] that occurred excepting that was one of the purposes for which the trust was formed.

Mr. Licking: I object. The answer is not responsive.

The Court: Sustained.

Mr. Licking: I move it be stricken.

The Court: He had no conversation.

Mr. Licking: I move it be stricken.

The Court: Yes.

Mr. Blum: I will stipulate it may be; it is not responsive. I am not asking if you recall any particular conversation, Mr. Weill. Were there any conversations at which you were present during which this point was discussed?

Mr. Licking: I object to that as too indefinite and uncertain, and considerably leading and suggestive.

The Court: Read the question.

(The question was read by the reporter.)

The Court: You may answer the question "Yes" or "No."

Mr. Licking: The further objection is on the ground no foundation is laid.

The Court: Well, I limited the answer. You may answer that question "Yes" or "No."

The Witness: I cannot answer it "Yes" or "No," your Honor.

The Court: Let the answer stand.

Mr. Blum: No further questions. [146]

Mr. Licking: I have no questions.

Mr. Blum: Plaintiff rests.

Mr. Licking: It seems to me, your Honor, there is no essential factual controversy, and that the written stipulation heretofore filed and the oral stipulation made here give the Court all the facts necessary for its decision in the matter. With that in mind the Government will rest its case.

The Court: For the purpose of the record, so I will have it in mind, you might repeat the question for decision in this case.

Mr. Licking: Well, the question, I would prefer to have counsel make the statement.

The Court: I am interested, and it will be helpful to me whenever I reach this. I may not reach it for a month. How much time do you want for briefs?

Mr. Blum: We have tentatively agreed, subject to your Honor's view, on 20, 20 and 10.

The Court: Well, I might forget all about it by that time, but if I have a record here on the question finally to be determined by this court it will be helpful.

Mr. Blum: The question finally to be determined by this court is whether or not this trust is an association taxable as a corporation, which in turn would upon the five points set forth in Morrissey vs. Commissioner, 296 United States, 344; [147] 56 Sup. Ct. 289; 80 Law Ed. 263. In that case the Court stated that the five primary essentials of a corporation are, first, title to the property held by the trustee as a corporate body with provision for succession; 2, selection of managers; 3, security for

termination or interruption by the death of owners of beneficial interests; 4, facility for transferal of beneficial interests; 5, limitation of the personal liability of the participants.

The Court: Were they dealing with a trust indenture there?

Mr. Blum: Yes.

(After oral discussion the matter was agreed to be briefed in 10, 20, and 5 days.) [148]

[Endorsed]: Filed July 11, 1945. [149]

[Title of District Court and Cause.]

NOTICE

To Messrs. Lloyd G. Rainey and Paul C. Jones, 810 South Spring Street, Los Angeles 14, California. Frank J. Hennessy, Esq., United States Attorney, Post Office Building, San Francisco 1, California.

You Are Hereby Notified that on August 3, 1945, Judge Michael J. Roche Ordered that there be entered in the above-entitled case, upon findings of fact and conclusions of law, Judgment in favor of plaintiff and against defendant in the sum of $5,474.97, together with interest thereon as provided by law from the dates of payment thereof and it is further Ordered that plaintiff recover from defendant its costs therein expended.

C. W. CALBREATH.
Clerk, U. S. District Court.

San Francisco 1, California, Aug. 4, 1945. [150]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on regularly to be heard on the 22nd day of May, 1945, before the Honorable Michael J. Roche, United States District Judge, a jury having been waived, plaintiff appearing by its attorneys, Lloyd G. Rainey, J. Everett Blum and Paul C. Jones, by J. Everett Blum, and defendant appearing by its attorneys, Frank J. Hennessy, United States Attorney and William E. Licking, Assistant United States Attorney, by William E. Licking, and the case having been tried on a stipulation of facts and oral testimony, the Court, being fully advised in the premises and the matter having been submitted, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The stipulation of facts together with exhibits "A" to "K", inclusive, referred to therein, filed herein on or about the 22nd day of May, 1945, are, and each of them is, found as facts in this case and by reference each is incorporated herein as fully as though set out at length herein. [151]

2. The trust referred to in Paragraph II of the stipulation of facts (Exhibit A) had no offices.

3. Said trust had no officers, except as the Board of Managers might be so construed to be.

4. Said trust issued no shares, or certificates, or other evidence of interest therein and had no stock ledger, or stock certificate book, or any books in lieu thereof.

5. Said trust has no seal, by-laws or minute book.

6. Said trust had no employees other than the Board of Managers and selling agent.

7. Said trust had no meetings.

CONCLUSIONS OF LAW

1. The trust created on or about the 28th day of January, 1926, and referred to in Paragraph II of the stipulation of facts (Exhibit A) was, and is, not an association taxable as a corporation within the meaning of Section 901 (a) (2) of the Revenue Act of 1938 and Section 3797 (a) (3) of the Internal Revenue Code.

2. The income of said trust is not taxable to said trust under Section 162 of the Internal Revenue Code.

3. This Court has jurisdiction of the subject matter and of the parties.

4. All the conditions precedent to the institution of this action have been complied with by the plaintiff.

5. Plaintiff is entitled to judgment against the defendant in the sum of $5,474.97, together with interest thereon as provided by law from the dates

of payment as follows: On $2,000.94 from March 15, 1939; on $58.56 from July 8, 1940; on $1,856.54 from March 15, 1940; on $1,147.43 from March 15, 1941; on $50.00 from July 26, 1938; on $75.00 from August 18, 1939; on $99.00 from July 30, 1940; on $187.50 from July 30, 1941. [152]

6. Plaintiff is entitled to recover costs against the defendant.

Dated: September 19th, 1945.

/s/ MICHAEL J. ROCHE,

Judge of the Above-Entitled Court.

Approved as to form:

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ W. E. LICKING,

Assistant United States Attorney.

[Endorsed]: Filed Sept. 16, 1945. [153]

In the District Court of the United States
Northern District of California, Southern Division

No. 23580-R

HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, TRUSTEE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT FOR REFUND OF TAXES

The above entitled matter having come on regularly to be heard on the 22nd day of May, 1945, before the Honorable Michael J. Roche, United States District Judge, sitting without a jury, plaintiff appearing by its attorneys, Lloyd G. Rainey, J. Everett Blum and Paul C. Jones, by J. Everett Blum, and defendant appearing by its attorneys, Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, by William E. Licking, the Court having made its Findings of Fact and Conclusions of Law:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That plaintiff have and recover of and from defendant the sum of $5,474.97, together with interest thereon as provided by law from the dates of payment as follows: On $2,000.94 from March

15, 1939; on $58.56 from July 8, 1940; on $1,856.54 from March 15, 1940; on $1,147.43 from March 15, 1941; on $50.00 from July 26, 1938; on $75.00 from August 18, 1939; on $99.00 from July 30, 1940; and on $187.50 from July 30, 1941; making a total interest charge [154] to and including August 15, 1945, in the sum of $1,809.09, together with a daily rate of interest thereafter of $.978726.

It Is Further Ordered that plaintiff recover from defendant its costs herein incurred and expended in the sum of $.....

Dated: September 19th, 1945.

/s/ MICHAEL J. ROCHE,
Judge of the Above-Entitled Court.

Approved as to Form:

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ W. E. LICKING,
Assistant United States Attorney.

[Endorsed]: Filed Sept 19, 1945. [155]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To the United States of America and to Frank J. Hennessy, Esq., United States Attorney:

You and Each of You Will Please Take Notice: That judgment in the above entitled matter was

entered of record on September 19, 1945, in the office of the clerk of the above-entitled court.

Dated: September 25, 1945.

LLOYD G. RAINEY,
J. EVERETT BLUM and
PAUL C. JONES,
By /s/ J. EVERETT BLUM,
Attorneys for Plaintiff. [156]

(Acknowledgment of receipt of copy of Notice of Entry of Judgment.)

[Endorsed]: Filed Oct. 3, 1945. [157]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the defendant, United States of America, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment made and entered herein September 19, 1945, in favor of the above named plaintiff.

Dated: December 17, 1945.

/s/ FRANK J. HENNESSSY,
United States Attorney.
/s/ WILLIAM E. LICKING,
Assistant United States
Attorney.
Attorneys for Defendant.

[Endorsed]: Filed Dec. 17, 1945. [158]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING THE ACTION

The defendant herein having this day filed Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment made and entered herein September 19, 1945, now upon the application of said defendant and appellant, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and Good Cause Appearing Therefor, it is hereby Ordered that said defendant and appellant have and hereby is given to and including March 16, 1946, for filing the record on appeal and docketing the action with said Appellate Court.

Dated: December 17, 1945.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Dec. 17, 1945. [159]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY DEFENDANT ON APPEAL

The defendant having taken an appeal on December 17, 1945, to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered herein by the United States District Court for the Northern District of California, Southern Division, on September 19, 1945,

hereby designates the following points to be relied on in the prosecution of said appeal:

The District Court erred:

1. In concluding that the trust created on or about January 28, 1926, was not and is not an association taxable as a corporation within the meaning of Section 901 (a) (2) of the Revenue Act of 1938 and Section 3797 (a) (3) of the Internal Revenue Code. [160]

2. In concluding that plaintiff is entitled to recover costs against the defendant;

3. In that the findings of fact do not support the conclusions of law;

4. In that the findings of fact do not support the judgment;

5. In failing to make a finding that the trust in question, if not taxable as an association, was taxable for the year 1938 as a trust on its undistributed income;

6. In concluding that plaintiff is entitled to judgment against defendant, and in entering judgment for defendant and in not entering judgment for plaintiff.

Dated: February 27, 1946.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ W. E. LICKING,
Assistant United States Attorney.
Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 27, 1946. [161]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The defendant having taken an appeal from the judgment made and entered herein on September 19, 1945, to the United States Circuit Court of Appeals for the Ninth Circuit, hereby designates the following parts of the record and proceedings for inclusion in the record on appeal:

1. Complaint;
2. Answer;
3. Amended answer;
4. Stipulation of facts;
5. Findings of fact and conclusions of law;
6. Notice;
7. Judgment for refund of taxes; [164]
8. Notice of entry of judgment;
9. Notice of appeal;
10. Statement of points on which appellant intends to rely on appeal;
11. Designation of record;
12. Transcript of proceedings;
13. Order of December 17, 1945, extending time for filing record on appeal and docketing the action.

Dated: February 27, 1946.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ W. E. LICKING,
Assistant United States Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 27, 1946. [165]

[Title of District Court and Cause.]

PLAINTIFF'S ADDITIONS TO DESIGNATION OF RECORD ON APPEAL

The defendant having taken appeal from the judgment made and entered herein on September 19, 1945, to the United States Circuit Court of Appeals for the Ninth Circuit, and having designated certain parts of the record and proceedings for inclusion in the record on appeal, plaintiff hereby designates the following for inclusion in said record on appeal:

1. Reporter's transcript of testimony of R. C. Hinderliter, Line 9, Page 5, to Line 2, Page 13;

Reporter's Transcript, Lines 2 to 5, Page 3.

Dated: March 11, 1946.

LLOYD G. RAINEY,
J. EVERETT BLUM and
PAUL C. JONES,

By /s/ J. EVERETT BLUM,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed March 12, 1946. [166]

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 23580-R

HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, TRUSTEE,
Plaintiff and Appellee,

vs.

UNITED STATES OF AMERICA,
Defendant and Appellant.

ORDER EXTENDING TIME FOR FILING RECORDS AND DOCKETING CAUSE

Upon application of Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, and good cause appearing therefor, It Is Hereby Ordered that the time for the above named defendant and appellant, in action No. 23580-R in the Southern Division of the United States District Court for the Northern District of California, to file the records on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to and including April 15, 1946.

Dated: March 15, 1946.

FRANCIS A. GARRECHT,

Senior Circuit Court Judge.

A true copy. Attest: March 15, 1946.

/s/ PAUL P. O'BRIEN,

Clerk.

[Endorsed]: Filed March 15, 1946. [168]

[Title of Circuit Court of Appeals and Cause.]

ORDER EXTENDING TIME FOR FILING RECORDS AND DOCKETING CAUSE

Upon application of Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, and good cause appearing therefor, It Is Hereby Ordered that the time for the above named defendant and appellant, in action No. 23580-R in the Southern Division of the United States District Court for the Northern District of California, to file the records on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to and including May 15, 1946.

No. 11,322

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*
vs.
HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Trustee, *Appellee.*

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR THE UNITED STATES.

FRANK J. HENNESSY,
United States Attorney,

W. E. LICKING,
Assistant United States Attorney,

DOUGLAS W. MCGREGOR,
Assistant Attorney General of the United States,

SEWALL KEY,

A. F. PRESCOTT,

PAUL S. MCMAHON,
Special Assistants to the Attorney General of the United States.

FILED

AUG 8 - 1946

PAUL P. O'BRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 11,322

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*
vs.
HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Trustee, *Appellee.*

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR THE UNITED STATES.

OPINION BELOW.

The District Court filed no opinion.

JURISDICTION.

The appeal involves federal income, excess profits and defense taxes with interest thereon for the taxable years 1938, 1939 and 1940, and capital stock taxes for the taxable periods ended each June 30 from 1938 through 1941. The aggregate amount involved is

$5474.97. Payments thereof were made in various amounts and upon various dates during the years 1938 to 1941, inclusive. (R. 97-98.) Separate claims for refund of each payment of taxes and interest were duly filed (R. 98-109), and were rejected by notices dated August 10, 1942, September 19, 1942, and October 1, 1942 (R. 153-155). Within the time provided by Section 3772 of the Internal Revenue Code the taxpayer brought an action on August 9, 1944, in the District Court for recovery of the taxes and interest paid. (R. 86.) Jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code, as amended. The judgment was entered on September 19, 1945. (R. 175-176.) Within three months a notice of appeal was filed on December 17, 1945 (R. 177), pursuant to the provisions of Section 128 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

1. Was the taxpayer taxable as an association under the provisions of Section 901 (a) (2) of the Revenue Act of 1938, c. 289, 52 Stat. 447, for the year 1938 and Section 3797 (a) (3) of the Internal Revenue Code for the years 1939 to 1941, inclusive?

2. If not, was it taxable as a trust on its undistributed income for the year 1938?

STATUTES AND REGULATIONS INVOLVED.

These will be found in the Appendix, *infra,* pages i-iv.

STATEMENT.

This action was submitted to the District Court on a written stipulation of facts, with exhibits attached (R. 95-155) and oral testimony (R. 156-171). The stipulation of facts was incorporated in the Court's findings. The material facts stipulated are as follows:

On the 28th day of January, 1926, at Bakersfield, California, 14 persons as trustors entered into a trust agreement with the Security Trust Company, as trustee, and conveyed to the trustee certain real property particularly described in the declaration of trust attached to the stipulation as "Exhibit A". On June 23, 1937, a supplemental agreement ["Exhibit B" attached to "Exhibit A"] (R. 96) was entered into between 12 trustors (eleven of the original and one new trustor), wherein it was alleged that the Bank of America National Trust and Savings Association was the successor to the Security Trust Company and as such succeeded to all the rights, powers, duties and liabilities conferred or imposed upon the latter corporation (R. 96-97).

By the terms of the original trust agreement, made a part of the stipulation of facts, it was provided that the trustors had caused or would cause to be executed and delivered to the trustee a deed conveying to it certain real property to be held in trust under the

terms and conditions and for the uses and purposes set forth in the trust. (R. 110.) These were, briefly: There should be a board of managers consisting of three beneficiaries who should be vested with the powers and responsibilities provided for them in the trust, to hold office at the pleasure of the majority of the beneficiaries; any vacancy to be filled by such majority. (R. 111.) The trustee, also called payee, was to hold the property as security for the payment to it of the sum of $14,000 as evidenced by a certain promissory note signed by the board of managers dated January 28, 1926, and for the payment to the payee of such other loans and advances as the payee might make during the continuance of the trust to the board of managers; and each trustor agreed that he, his successors and assigns, should be severally liable to the payee for the payment of the balance due on the note or notes in the proportion set opposite his name as beneficiary. (R. 111-112.)

The trustee was to subdivide and improve the real property conveyed, in such manner as might be agreed upon between the board of managers and the trustee; to have authority to dedicate to public use all streets and alleys shown upon the subdivision map to be prepared by the board and executed and acknowledged by the trustee (R. 112); to sell the real property by lot or lots free of the lien of the payee, upon such terms and conditions, to such purchasers, for such prices and payable in such manner as the trustee deemed best, provided that the sale price should not be less than that agreed upon by the trustee and the board or the

selling agent provided for by the trust, and provided further that the selling price of any parcel should not be less than an amount which bore the same ratio to the balance due the payee as the lot sold bore to the remaining unsold parcels of land (R. 112-113). The trustee was to distribute the cash proceeds from the sale of lots in a certain designated manner, including costs and expenses of the trustee; real estate commissions; release of any liens; payment of bills approved by the board for labor and material utilized for the improvement of the property; payment on notes to the payee-trustee, and the balance thereof to the beneficiaries as their respective interests might appear. (R. 113-114.)

Sale or transfer of any beneficial interest was provided for if an executed original of the assignment or other instrument evidencing such sale or transfer was filed with the trustee; and any interest could also be transferred by decree or order of court, upon satisfactory proof of the regularity and validity of the proceedings. (R. 115.) If any portion of the property should become liable for the payment of any taxes, the trustee was to have authority to withhold sufficient money and to pay such tax (R. 115); or if there were no funds available, to advance the same, this advance to be a lien on the property (R. 115-116); and the trustors agreed severally on behalf of themselves, their successors and assigns, to pay their respective proportions of all liens, encumbrances, taxes, insurance, or other charges necessary or proper for the preserva-

tion, maintenance or care of the property and the expenses of the trust (R. 116).

Provisions were made as to default, the recordation of notice thereof, and sale of the property to satisfy the debt, all at the option of the trustee (R. 117); the sale to be at public auction, either in separate parcels or of the property as a whole in the discretion of the trustee; and the proceeds from the sale to be applied on the expenses of sale, the debt, and any balance to the person legally entitled thereto (R. 118-120).

The trust was not to terminate in any event until all costs, fees, expenses, liabilities and advances of trustee, with interest, had been fully paid. (R. 120.) If the above condition was met, the beneficiaries were granted the power to revoke the trust at any time after one year from the date of its creation by notice of revocation at least 60 days prior to the effective date of the proposed revocation; reconveyances thereupon to be made to all the beneficiaries thereunder as their respective interests might appear. (R. 121.) Fees for services rendered by the trustee were also provided. (R. 122-123.) A selling agent was designated and the trustee was to execute conveyances or contracts for sale of lots upon request of the agent. (R. 120-121.) The supplementary agreement dated June 23, 1937, merely substituted the Bank of America National Trust and Savings Association as trustor in place of the former trust company (R. 124); provided for the making of new advances to the beneficiaries by the new trustee, and provided that the then bene-

ficiaries of the trust were to be proportionately liable for their repayment (R. 125-127).

The remaining facts stipulated to herein were the amount of tax payments made by the trust, fully itemized, and totalling $5474.97; the dates of their respective payments (R. 97-98); the filing of claims for the return thereof, and the rejection of these by the Commissioner of Internal Revenue, with notice to the trustee (R. 98-109). Copies of all of these documents are attached to the stipulation of facts as exhibits. (R. 128-155.)

The transcript of record shows that it was stipulated at the trial that an amended answer was filed setting up a counterclaim on behalf of the Government, taxing the plaintiff as a true trust on its undistributed income, in the event it should not be found taxable as an association, and a further stipulation to the effect that this new matter should be deemed denied by plaintiff (R. 157-158); and it was further stipulated that in the event plaintiff should be found to be a true trust, and taxable as such, the computation of $400.01 should be deemed the correct amount of tax for the year 1938 and that there was then no tax liability for the years 1939 and 1940 (R. 158-159).

Based upon testimony of the assistant trust officer of the Bank of America in Bakersfield (R. 160-168) the District Court also found as facts: that the trust had no offices; it had no officers, except as the board of managers might be so construed to be (R. 172); the trust issued no shares, or certificate or other evi-

dence of interest therein and had no stock ledger, or stock certificate book or any books in lieu thereof; it had no seal, by-laws or minute book; it had no employees other than the board of managers and selling agent; and the trust had no meetings (R. 173).

Upon the above findings the District Court concluded that: the trust created on January 28, 1926, was, and is, not an association taxable as a corporation within the meaning of Section 901 (a) (2) of the Revenue Act of 1938 and Section 3797 (a) (3) of the Internal Revenue Code; that income of the trust is not taxable to the trust under Section 162 of the Internal Revenue Code, and that the plaintiff is entitled to judgment for the taxes involved in the action with interest from the payment dates. (R. 173-174.)

STATEMENT OF POINTS TO BE URGED.

The District Court erred:

1. In concluding that the trust created on or about January 28, 1926, was not and is not an association taxable as a corporation within the meaning of Section 901 (a) (2) of the Revenue Act of 1938 and Section 3797 (a) (3) of the Internal Revenue Code;

2. In concluding that plaintiff is entitled to recover costs against the defendant;

3. In that the findings of fact do not support the conclusions of law;

4. In that the findings of fact do not support the judgment;

5. In failing to make a finding that the trust in question, if not taxable as an association, was taxable for the year 1938 as a trust on its undistributed income;

6. In concluding that plaintiff is entitled to judgment against defendant, and in entering judgment for defendant and in not entering judgment for plaintiff.

SUMMARY OF ARGUMENT.

The taxpayer trust is an association taxable as a corporation because it was organized by an association of individuals as a medium for the carrying on of a business enterprise for profit and it has the salient features of a business trust, making it analogous to a corporation.

The trust was created as a business enterprise, thus complying with the first essential for classification as a taxable association under controlling decisions of the Supreme Court and other federal courts. The primary purpose of the trust was to improve, subdivide and sell a tract of land.

The trust has the salient features of a business trust making it analogous to a corporation. (1) Title to the property was held by the trustee as a continuing entity. There is no specific provision for succession in the trust agreement, but the trustee was a financial corporation in which continuity is inherent. The original trustee was in fact succeeded by the present trustee. (2) Centralized management is effected by

a board of managers who, with the trustee, was to improve and subdivide the property, fix prices, execute conveyances, collect and distribute income—the board of managers and the trustee were to conduct the enterprise in much the same manner as directors. (3) Security from interruption by death is provided for, since the continuance of the trust is not affected in any way by death of any of the beneficiaries. (4) Transfer of beneficial interests is provided for and some transfers were actually made. (5) The liability of each trustee for obligations, expenses and charges against the trust is limited to the same proportion of those charges as his interest in the trust. These are the criteria established by the Supreme Court in determining whether a trust is a taxable association.

If the trust is not taxable as an association then it is taxable as a pure trust on its undistributed income. The District Court erred in holding that the trust was not taxable on the theory that it was a revocable trust, the income of which was taxable to the grantors under Section 166 of the Internal Revenue Code. Section 166 applies only when there is power to revest in the grantor the corpus of the trust by action of the grantor alone or in conjunction with any person not having a substantial adverse interest in the disposition of the corpus or income. Here the grantors who were also the beneficiaries had substantial interests adverse to each other since each is bound to assume his proportionate share of the obligations and liabilities of the trust. Accordingly, Section 166 does not apply.

ARGUMENT.

I.

THE TAXPAYER TRUST CONSTITUTED AN ASSOCIATION TAXABLE AS A CORPORATION WITHIN THE MEANING OF THE APPLICABLE INTERNAL REVENUE LAWS.

The contentions of the parties of this action are briefly:

The Government contends that the taxpayer trust is an association taxable as a corporation because it was organized by an association of individuals as a medium for the carrying on of a business enterprise for profit and it has the salient features of a business trust making it analogous to a corporation.

The taxpayer contends that it is purely a loan-security and liquidation trust having non-business purposes and that it is not an association taxable as a corporation.

This Court has passed upon the question whether an organization is a business trust taxable as a corporation in many cases, among them *Willis v. Commissioner,* 58 F. (2d) 121; *Porter v. Commissioner,* 130 F. (2d) 276; *Sloan v. Commissioner,* 63 F. (2d) 666; *Title Insurance & Trust Co. v. Commissioner,* 100 F. (2d) 482; *Commissioner v. Security-First Nat. Bank,* 148 F. (2d) 937.

In the *Security-First National Bank* case, *supra,* the Court held (pp. 938-939):

> The character of the organization as to whether or not it is a "business trust," is determined by what the instruments creating the trust empowered the trustee to perform, and not by what

powers the trustee actually exercised. This appears in *Morrissey v. Commissioner of Internal Revenue,* 296 U. S. 344, 357, 56 S. Ct. 289, 295, 80 L. Ed. 263, in the words "but the *nature* and *purpose* of the cooperative undertaking will differentiate it from an ordinary trust," and in the companion case of *Helvering v. Coleman-Gilbert,* 296 U. S. 369, 374, 56 S. Ct. 285, 287, 80 L. Ed. 278, where the Supreme Court, in speaking of the "purpose" appearing in the instrument creating the trust, states "The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted."

Here the trustee was empowered to receive the royalties from the oil and gas leases in kind. This would require it to conduct the business of selling the oil or gas to obtain the cash to be distributed to the beneficiaries. The trustee was also empowered to engage in the business of "rent [ing and] leas [ing the trust property] for other than oil or gas purposes" and sell or convey it outright. The organization was thus purposed to engage in business within the *Coleman-Gilbert* decision, *supra.* Cf. *Kettleman Hills Royalty Syndicate No. 1 v. Commissioner of Internal Revenue,* 9 Cir., 116 F. (2d) 382, 383, certiorari denied 313 U. S. 582, 61 S. Ct. 1100, 85 L. Ed. 1538.

The organization otherwise complied with the criteria of the *Morrissey* case, *supra,* showing it analogous to a corporation (1) holding title to the trust property by the trustee; (2) centralized management in the trustee; (3) continuity of the trust enterprise uninterrupted by the deaths of

the owners of the beneficial interests; (4) transferable beneficial interests; and (5) limitation of personal liability of the participants as for the stockholders of a corporation.

The Government contends that the Homecrest Tract trust also was created as a business enterprise and otherwise complied with the criteria of *Morrissey v. Commissioner,* 296 U. S. 354, showing it analogous to a corporation.

(a) The trust was created as a business enterprise.

In order that a trust be taxable as an association the first essential is that it be organized for business purposes. In the *Morrissey* case, *supra,* it was held (pp. 356-357):

> "Association" implies associates. It implies the entering into a joint enterprise, and, as the applicable regulation imports, an enterprise for the transaction of business. This is not the characteristic of an ordinary trust—whether created by will, deed, or declaration—by which particular property is conveyed to a trustee or is to be held by the settlor, or specified trusts, for the benefit of named or described persons. Such beneficiaries do not ordinarily, and as mere cestuis que trustent, plan a common effort or enter into a combination for the conduct of a business enterprise. Undoubtedly the terms of an association may make the taking of acquiring of shares or interests sufficient to constitute participation, and may leave the management, or even control of the enterprise, to designated persons. But the nature and purpose of the cooperative undertaking will differentiate it from an ordinary trust. In what

> are called "business trusts" the object is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of a business and sharing its gains. Thus a trust may be created as a convenient method by which persons become associated for dealings in real estate, the development of tracts of land, the construction of improvements, and the purchase, management and sale of properties; or for dealing in securities or other personal property; or for the production, or manufacture, and sale of commodities; or for commerce, or other sorts of business; where those who become beneficially interested, either by joining in the plan at the outset, or by later participation according to the terms of the arrangement, seek to share the advantages of a union of their interests in the common enterprise.

It is clear that the trust here involved was more than an ordinary trust created for the purpose of protecting or conserving property, and that it was created for purposes far beyond those of a trust for mere security or liquidation purposes, as was maintained by the taxpayer in the Court below.

In determining whether the trust was organized for business purposes the agreement must be examined in detail and as a whole. By doing that it is clearly disclosed that the trust was created as a "convenient method by which persons became associated for dealings in real estate, the development of a tract of land, and the construction of improvements; where those who became beneficially interested sought to share the advantages of a union of their interests in the common

enterprise." *Morrissey v. Commissioner, supra.* It is clear, moveover, that the primary purpose for organization of the trust was to improve, subdivide and sell a tract of land at a profit, which was a definite business enterprise.

Under the terms of the trust agreement entered into at Bakersfield, California, on January 14, 1926, fourteen individuals conveyed by deed to Security Trust Company, as trustee, a quarter section of real property situated in Kern County, California. (R. 110.) A board of managers consisting of three beneficiaries was appointed, with powers and duties as prescribed in the instrument. (R. 111.) The trustee, also called the payee, loaned $14,000 to the trust concurrently with execution of the agreement and it was provided that the trustee should hold the real property as security for that loan and other loans and advances which might be made to the trust during its existence. (R. 111-112.)

The trustee was directed to subdivide and improve the property. A map of the new subdivision was to be prepared by the board of managers and executed and recorded by the trustee. Streets and alleys shown on the map were dedicated by the trustee to public use. (R. 112.) The trustee was to sell the lots free of its lien (the trustee's lien) upon such terms and conditions and for such prices as the trustee might deem best. (R. 112-113.) The only restriction upon the trustee was that the sale prices of lots should not be less than those agreed upon by the trustee and the board of managers or the selling agent. (R. 113.)

The trustee was to receive the proceeds and distribute the funds. (R. 113.) That a profit was contemplated is very apparent from the provision for minimum sale prices of the lots and from the careful enumeration of the expenses and outlays which were first to be taken care of, after which the beneficiaries were to receive their proportionate shares of the proceeds. (R. 113-114.) Obviously substantial income and profits were received each year, since the taxes assessed are not insubstantial. (R. 97-98.) The record does not show what proportions of the income were from cash sales, contracts or rents. The agreement provided that the trustee should not collect or disburse rentals, but that the trustors themselves should. (R. 116-117.) [However, the collection of rentals was contemplated, and that in itself denotes business activity.] Neither does it show the amounts expended for improvements, labor or materials. However, improvements were clearly contemplated and their payment provided for. (R. 112, 114.) It may fairly be inferred that the expense of laying out and improving the tract was considerable in amount. The initial loan required to start the project was $14,000 (R. 111-112), and the agreement provided for additional loans as required for trust purposes. (R. 112.) No limit was provided as to the amount that the board of managers might borrow or expend in improving or developing the subdivision.

The agreement provided that the trustee should commence or defend suits with respect to the property upon written request of the trustors or beneficiaries,

accompanied by a sufficient sum of money for the purpose. (R. 117.) Detailed procedure to be taken by the trustee in the case of default in payment of debts to the trust or to the trustee is provided in the agreement (R. 117-119) and the method and order of precedence in distributing the proceeds of property in cases of default are specified. (R. 119-120.)

One of the beneficiaries of the trust was designated as the selling agent of the land. It was provided that the trustee would make sales of any lots in the subdivision in accordance with the terms of written requests by the trustee. (R. 120-121.) But only the trustee could execute deeds or contracts with respect to the property. (R. 117.)

The Government submits that it is abundantly clear from the terms of the trust instrument that the organization was purposed to engage in business. There was no evidence at the trial below as to the activities actually engaged in by the trust. Except with respect to the capital stock taxes involved it is immaterial whether or not the trust exercised its business purposes. It was empowered to engage in business and therefore should be classified as a taxable association. *Morrissey v. Commissioner,* 296 U. S. 344. However, the taxpayer nowhere asserts that the trustee did not exercise all of its powers, functions and duties, but merely asserts that the duties were ministerial in nature only. (R. 129.) But it is apparent that the trust was carrying on its business activities. How else could it have earned the substantial income it did each year?

In addition to decisions involving the question of taxability of business trusts this Court has had for decision the question of what constitutes business in many cases involving the capital stock tax, among them *United States v. Hercules Mining Co.,* 119 F. (2d) 288, certiorari denied, 308 U. S. 617; *Barker Bros. Corp. v. Rogan,* 126 F. (2d) 917; *United States v. Western Shore Lumber Co.,* 136 F. (2d) 628; and *Section Seven Corp. v. Anglim,* 136 F. (2d) 155. In order that corporations be liable for the capital stock tax it is necessary not only that they be organized to engage in business for profit but that they actually engage in business. Obviously, however, the definitions and tests as to what constitutes business must be the same whether the question at issue is the power to do business or the actual carrying on of business.

In the *Section Seven Corporation* case, *supra,* there is a rather exhaustive discussion of the Supreme Court cases dealing with the "doing business" question. Following those decisions it was held (p. 158) that if a corporation was organized for profit and was doing what it was principally organized for in order to realize profit, no special volume of business is necessary to bring it within the taxing act—a very slight activity may be deemed sufficient to constitute "doing business." *Flint v. Stone Tracy Co.,* 220 U. S. 107; *Von Baumbach v. Sargent Land Co.,* 242 U. S. 503; *Edwards v. Chile Copper Co.,* 270 U. S. 452.

We feel safe in saying that this Court and other federal Courts have held that organizations were empowered to and did carry on business where consider-

ably less activity was disclosed than in this case. For instance Section Seven Corporation was organized to draw into a single possession the various interests in the land, to clear the title, to enter into an oil and gas lease, to receive the royalties, to determine whether they should be collected in cash or kind and, by reasonable implication, to enforce the terms of the lease, and to distribute the income. It executed rights of way over the land in favor of third persons. This Court said (p. 159):

> With a full knowledge of all this [the activities above enumerated], we must decline to say that Section Seven Corporation, in doing what it was organized to do, was not doing business.

Incidentally, it may be noted that in the *Section Seven* case, *supra,* the incorporators owned separate portions of the tract before the organization was formed. In briefs filed in the Court below in this case the taxpayer attached great significance to the fact that these trustors owned individual portions of the tract before the trust was formed. It was argued that this distinguished the case from some others cited by the Government where trusts were formed, and with money furnished by the trustors, property was acquired. It was said that where property was to be acquired there could be no question that the trust was to engage in business, rather than merely to liquidate property already owned, as was claimed to be the situation in this case.

In the *Section Seven* case, *supra,* this Court said (pp. 158-159):

> Respecting the option in the contract to take the royalties in cash or in kind, the taxpayer contends that because unless the option was exercised the royalties were to be paid in cash and the option to take in kind was not exercised, the mere power to elect does not constitute "doing business." A short answer is that it is the exercise of the judgment to take in cash or in kind that constitutes a business activity; in a word the taxpayer elected not to exercise the option, which is a business activity. Besides, this court heretofore has said: "It is our opinion that in making these successive decisions whether it will require the delivery of the royalty product in kind or in cash, the taxpayer is making a succession of business judgments and 'is doing the business' within the decision of *Morrissey v. Commissioner,* 296 U. S. 344, 360, 56 S. Ct. 289, 80 L. Ed. 263."
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> *Kettleman Hills Royalty Syndicate No. 1 v. Commissioner,* 9 Cir., 116 F. (2d) 382, 383.

We think it is quite apparent that the business activities of the Section Seven Corporation Trust were much less than those of the Homecrest Tract Trust.

In *Barker Bros. Corp. v. Rogan,* 162 F. (2d) 917 (C.C.A. 9th), the corporation was held to be doing business although its only activities were in transactions with two subsidiaries. The company borrowed money from one subsidiary to be used in aiding the other subsidiary in acquiring a leasehold and collected moneys due it under the transaction and made payments on its loans. Again, the business activities carried on appear to be much less than those in this case.

In *United States v. Western Shore Lumber Co., supra,* the corporation was organized to acquire timber lands and to cut and market the timber. But it ceased active operations long prior to the taxable years involved. Its intention before and during the taxable years in question was to effect liquidation by selling its timber lands as a whole. It collected sums from a lumber company under a stumpage contract. This timber was cut from an isolated section of the taxpayer's properties which rendered that land valueless and amounted in essence to a liquidation of the property from which the timber was cut. Upon these slight activities it was held that the corporation was not dormant but was doing business.

The taxpayer contended in the Court below that no business purpose was shown and that it was merely a liquidating trust for the security of the bank. Cases cited by the taxpayer are clear liquidation trust cases with which we do not disagree since they are correct on their facts, but in no way analogous to this case. *Girard Trust Co. v. Commissioner,* 34 B.T.A. 1066; *Broadway-Brompton Building Liquidation Trust v. Commissioner,* 34 B.T.A. 1089; *Pitzman v. Commissioner,* 36 B.T.A. 81. The distinction is pointed out by this Court in *Willis v. Commissioner,* 58 F. (2d) 121, where it is said (p. 122):

> * * * Simply stated, the question is, did the trustees manage and operate the property in their charge as a business, with the purpose to accumulate a profit by the use of it, or was their sole purpose, intended and pursued, to dispose of it as rapidly as possible, market conditions con-

> sidered, and divide the proceeds among the beneficiaries? As a liquidating trust purely, the income would not be taxable; as a business venture the income would be taxable. The distinction is made clear in the cases: *Hecht v. Malley,* 265 U. S. 144, 44 S. Ct. 462, 68 L. Ed. 949; *Blair v. Wilson Syndicate Trust,* 39 F. (2d) 43 (C.C.A. 5); *Commissioner v. Atherton,* 50 F. (2d) 740 (C.C.A. 9); * * *

In the *Willis* case the Court held that the trustees went beyond the single purpose of effecting a liquidation of assets, and for that reason the collection of income taxes was proper.

The trust involved in the present case is a liquidating trust only in the sense that it is inevitable, in the nature of things, that every trust contemplating the creation of a real estate subdivision and the sale of lots is eventually liquidated by the sale of all the lots. Here the sole purpose was not to dispose of the property as rapidly as possible and divide the proceeds among the beneficiaries. On the contrary, the purpose was to subdivide and improve the property and to sell lots for cash or on contracts—clearly a business enterprise with profit motives.

The following appears as the syllabus in the case of *Magruder v. Washington B. & A. Realty Corp.,* 316 U. S. 69-70:

> 1. A corporation which was organized for the purpose of liquidating the properties of another corporation, and which, since its organization, has been carrying on negotiations for the sale of the properties, selling them from time to time as

satisfactory offers are received, and renting unsold properties under short term leases in an attempt to earn the carrying charges pending ultimate sale, was "carrying on or doing business" within the meaning of provisions of the Revenue Act of 1935, and subsequent Revenue Acts, imposing a tax on the capital stock of every domestic corporation "carrying on or doing business" during the tax year. P. 71.

2. The provision of the Treasury Regulations that "doing business" within the meaning of the capital stock tax provisions of the Revenue Act of 1935, and subsequent Revenue Acts, includes activities of a corporation engaged in "liquidation * * * of properties taken over from another corporation" is valid and applicable to the corporation here involved. P. 72.

The Court noted (pp. 73-74) that Article 43(a) (5) of Treasury Regulations 64 (1936 ed.) is both a contemporary and a long standing administrative interpretation, and that it was continued in the 1938 edition of Regulations 64, which is applicable to the present case.

We submit that the *Washington B. & A. Realty Corporation* case is controlling here. Capital stock taxes are involved in this case as well as income and excess profits taxes. (R. 97-98.) Moreover, we believe it is apparent that the business activities of this taxpayer were more extensive than those of the taxpayer in the Supreme Court case. In this case the trust not only took over the real estate of the trustors for the purpose of sale but the trustee was required to

subdivide and improve the property to sell it at advantage and for profit.

(b) The trust has the salient features of a business trust making it analogous to a corporation.

In the *Morrissey* case, *supra,* the Court enumerated certain salient features as rendering a trust analogous to a corporation. We believe that all of those features are present in the Homecrest Tract Trust. They are (1) *The holding of title to the trust property by the trustee as a continuing body with provision for succession.* There can be no question but that it was intended that the trustee should hold title to the real estate throughout the life of the trust. There is no specific provision for succession in the trust agreement. But that omission is not of consequence under the circumstances here. The fact that a financial corporate trustee was chosen indicates that continuity was contemplated for the trust term. The corporate nature of the trustee has the element of continuity inherent in itself. Moreover, any failure to name or specifically provide for a successor trustee is answered by the fact that the original corporate trustee was succeeded by the present corporate trustee. (2) *Centralized managment in the trustee.* Centralization of management is effected by a board of managers who, together with the trustee, were to subdivide and improve the property, to effect the execution of documents and conveyances, to accept and repay loans, to collect and distribute income and to pay expenses. In brief the board of managers and the trustee are charged

with the conduct of the enterprise in "much the same manner as directors". *Morrissey v. Commissioner, supra.* (p. 359.) (3) *Security from termination by death of beneficiaries.* Security from termination or interruption by death of the owners of beneficial interests is provided for, since the continuance of the trust is not affected in any way by the death of any of the beneficiaries. (4) *Transferable beneficial interests.* Transfer of beneficial interests by the beneficiaries is provided for, the only requirement being that an executed original of the instrument evidencing the transfer be filed with the trustee. Transfer of beneficial interests by Court order is also contemplated and provided for. (R. 115.) Transfers of beneficial interests actually were made since fourteen original trustors entered the agreement of January 28, 1926 (R. 114-115), and the supplemental agreement of June 23, 1937, was entered into by twelve trustors, eleven of the original and one new trustor. (R. 127-128.) (5) *Limitation of personal liability.* The trust agreement provides that each trustor or his successor shall be severally liable to the payee for payment of the balance due on notes given for loans in the proportion set opposite his name as beneficiary (R. 112) and the trustors severally agreed to pay, when due, their respective proportions of all liens, taxes, etc. against the property and other charges or indebtedness and expenses of the trust. (R. 116.)

The taxpayer contended below that this was not the sort of limited liability contemplated by the Supreme Court in the *Morrissey* case, *supra,* where the follow-

ing sentence appears (p. 359): "The trust method also permits the limitation of personal liabilty of participants to the property embarked in the undertaking." It appears that a similar contention was made in the case of *Commissioner v. Security-First Nat. Bank* but this Court rejected it saying (p. 939):

> With regard to the limitation of personal liability, it is limited to assessments by the trustee on the beneficiaries for no more than "his proper proportion" of the debts and liabilities incurred in the administration of the trust property. The California corporate law comprehends such assessment of corporate shareholders. Section 331 of the Civil Code of California provides in paragraph (1) thereof that "Shares issued by stock corporations are not assessable except as provided in this article. If the articles expressly confer such authority upon the corporation or the board of directors, and subject to any limitations therein contained, the directors may in their discretion, levy and collect assessments upon all shares of any or all classes made subject to assessment by the articles. * * *" Prior to 1930 the California constitution by Article XII, Section 3, made mandatory such proportionate liability of shareholders.

We believe that it has been demonstrated above that the trust in this case complied with *all* of the criteria of the *Morrissey* case, *supra,* showing it analogous to a corporation. However, even if there is not strict compliance it should not affect the decision of the case. If a trust is designed to operate a profitable enterprise with the comparative facility and to serve the

purposes of a corporate unit so as to dispense with the necessary activity and concurrence of numerous individuals, the absence of any of the tests set out in the *Morrissey* case, *supra,* will not take the trust out of the category of a taxable association within the Revenue Acts in question. *Fidelity Bankers Trust Co. v. Helvering,* 113 F. (2d) 14 (App. D.C.); *Merchants Trust Co. v. Welch,* 59 F. (2d) 630 (C.C.A. 9th).

The Government does not consider that it is necessary or that it would be helpful to this Court to review a large number of the authorities dealing with the question whether a trust is or is not a business trust and therefore taxable as a corporation. After all, the decision in each case must depend upon the particular trust agreement before the Court. *Commissioner v. Security First Nat. Bank, supra.* That recent decision, we believe, is indistinguishable in principle and it is determinative of the issues here. In the Court below the taxpayer contended that the cases are distinguishable in that the Security trust was formed to acquire property and could enter into the oil business, while in the instant case the trust was formed to liquidate the property. We believe that we have effectually disposed of the taxpayer's contention above.

All of the following cases, we submit, fully support the Government's contention that the taxpayer was an association taxable as a corporation. *Morrissey v. Commissioner,* 296 U. S. 344; and associated cases; *Willis v. Commissioner,* 58 F. (2d) 121 (C.C.A. 9th); *Porter v. Commissioner,* 130 F. (2d) 276 (C.C.A. 9th);

Fidelity-Bankers Trust Co. v. Helvering, 113 F. (2d) 14 (App. D.C.); *Sloan v. Commissioner,* 63 F. (2d) 666 (C.C.A. 9th); *Title Insurance & Trust Co. v. Commissioner,* 100 F. (2d) 482 (C.C.A. 9th); *Commissioner v. Vandegrift R. & Inv. Co.,* 82 F. (2d) 387 (C.C.A. 9th); *Del Mar Addition v. Commissioner,* 113 F. (2d) 410 (C.C.A. 5th); *Wellston Hills Syndicate Fund v. Commissioner,* 101 F. (2d) 924 (C.C.A. 8th). Of course, there are variations in the terms of the trust agreements involved in the cases. But we see no point in comparing the various agreements item by item with the agreement in the present case to show similarities or, perhaps, to reconcile differences. The strength of the authorities is that in each case, under the terms of the respective agreements, which were in controlling effect similar to the agreement in this case, it was held that the trusts were taxable associations because they were created for business purposes and had features analogous to corporations.

The taxpayer in the Court below placed chief reliance on the case of *Lewis & Co. v. Commissioner,* 301 U. S. 385, which, it was claimed, is the only truly parallel case to the one at bar. We believe the situations in the two cases are in no sense parallel, but that they are quite different in many important and controlling features. In the *Lewis* case, *supra,* a landowner made a declaration placing title in a corporate trustee for the benefit of herself and an agent empowered by her to sell the land, whose compensation was to be a fixed percentage of payments made by purchasers. The only functions of the trustee were to

hold the title, execute contracts and conveyances at the direction of the agent, and to make collections. It was held that the trust was not an association taxable as a corporation.

The Supreme Court distinguished the case in detail from the *Morrissey* case, *supra.* The same distinctions prevail here. It was held (p. 387) that if it were not for the declaration of trust, it would be a simple case of an appointment by a landowner of an agent to subdivide the land and sell it, and to receive as compensation for his services a fixed percentage of the payments made by the purchasers. The Court held that the intervention of the trustee to hold title, make conveyances at the direction of the agent and to make collections did not alter the situation.

In distinguishing the *Morrissey* case, *supra,* the Court first pointed out that there the trust was a medium for carrying on a business enterprise by the trustee and participation in the profits by numerous beneficiaries whose interests were represented by transferable certificates, thus permitting the introduction of new participants, without affecting the continuity of the plan. (pp. 387-388.) Except for the issuance of certificates the same situation exists in this case. Here there was contemplated a business enterprise by the trustee; numerous beneficiaries participated in the profits; transfers of the interests of beneficiaries were provided for and actually consummated without affecting the continuity of the plan. Next, the Court said that it had been pointed out in the *Morrissey* case, *supra,* that the corporation an-

alogy was evidenced by centralized control, continuity and limited liability. (p. 388.) We believe it has been adequately demonstrated above that the same factors are present in this case. The Court then refers to the statement in the *Morrissey* case, *supra,* that the word "association" implies associates. (p. 388.) In the *Lewis* case, supra, there were no associates; in the present case, of course, the associates were numerous. Then the Court quoted from its earlier decision to the effect that "association" implies entering into a joint enterprise for the transaction of business. We have dealt with this phase of the present case above and, we believe, established that we have here a joint business enterprise. It was held that the arrangement in the *Lewis* case, *supra,* answered the description of an ordinary trust—by which particular property is conveyed to a trustee on specified trusts for the benefit of named or described persons who do not ordinarily, and as mere *cestuis que trustent* enter into a combination for the conduct of a business enterprise. The trust in the *Lewis* case, *supra,* it was held, was adopted merely as a convenient means of making effective the sales of the agent under his contract. Further, it was held that the duties of the trustee were purely ministerial, with no power to control, direct, or participate in the contemplated selling enterprise. Quite in contrast the trustee in the present case was itself to subdivide, improve and sell the property, dedicate part of it to public use, pay bills for labor and material, receive all proceeds (except rents) and disburse the funds, foreclose upon de-

fault, convey lots and clear titles, and fix sales prices, terms and conditions of sales jointly with the board of managers and the selling agent.

In the *Lewis* case, *supra,* the Supreme Court held further that there was to be found in the operation of the business no essential characteristic of corporate control—nothing analogous to a board of directors or shareholders, no exemption from personal liability, no issue of transferable certificates of interest. With the exception of transferable certificates, we feel that it has been adequately demonstrated above that all of the factors found wanting to establish an association in the *Lewis* case, *supra,* are present in the case at bar. The *Lewis* case, *supra,* far from supporting the taxpayer's contentions, serves to emphasize the distinction between the Homecrest Tract Trust and an ordinary trust and fully supports the Government's position that this taxpayer should be held to be an association taxable as a corporation.

It is apparent that the trust agreement in this case falls squarely within the applicable regulation as an association taxable as a trust. Treasury Regulations 103, Section 19.3797-3, Appendix, *infra.* The regulation for the most part merely paraphrases the language of the Supreme Court and other federal courts with respect to various provisions and circumstances presented in the large number of cases involving the distinction between an association and an ordinary trust. The taxpayer, in the Court below, attached some weight to the fact that this trust did not have certain attributes, forms or activities generally found in corpo-

rate organizations. But the omission or lack of any or all of the conditions or circumstances stressed by the taxpayer is held to be of no consequence by the regulation which is as follows, in part:

> The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer", the use of a "seal", the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws", the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Internal Revenue Code disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charger, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust."

The regulation is both a contemporary and a long standing administrative interpretation. We submit that it is valid, as well as applicable. *Magruder v. Washington B. & A. Realty Corp., supra.* We submit that under the applicable internal revenue laws, the

regulations promulgated thereunder and controlling court decisions the taxpayer was an association taxable as a corporation, and that the taxes involved in this action were legally and properly assessed and collected.

II.

IF THE TRUST IS NOT TAXABLE AS AN ASSOCIATION, IT IS TAXABLE AS A TRUST ON ITS UNDISTRIBUTED INCOME FOR THE YEAR 1938.

In the District Court the Government raised the alternative contention that if the trust was not taxable as a corporation, then it was taxable as a true trust on its undistributed income for the year 1938. (R. 157-158.) The parties stipulated at the trial as to the amount of tax that would be due if the trust were found to be a true trust, and taxable as such. (R. 158-159.)

The Government's contention was based on the provisions of Section 162 of the Internal Revenue Code, as follows:

> Sec. 162. NET INCOME.
>
> The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—
>
> * * * * * * *
>
> (26 U.S.C. 1940 ed., Sec. 162.)

The taxpayer contended that under Section 166 of the Internal Revenue Code the income was taxable to the beneficiaries because of the trustor's power to revoke. Section 166 is as follows:

Sec. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person, not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, then the income of such part of the trust shall be included in computing the net income of the grantor. (26 U.S.C. 1940 ed., Sec. 166.)

The District Court concluded that the income of the trust is not taxable to the trust under Section 162. (R. 173.)

We believe the District Court erred in holding that the trust was not taxable on its undistributed income under Section 162. The Court assigned no reason for the conclusion reached in this connection. By implication, however, it would appear that the Court considered that the grantors, who were also the beneficiaries, had no substantial adverse interests in the disposition of the trust nor substantial interests adverse to each other. The Government contended below and now contends that it is obvious that the grantors do have substantial interests adverse to each other in view of the fact that each is bound to assume his proportionate share of the obligations and liabilities of the trust to the extent of his particular bene-

ficial interest. (R. 121.) Revocation of this trust could be effected only by the united action of 12 or 14 grantors and beneficiaries, each with an interest adverse to each of the others. It might well be that one or more of the grantors and beneficiaries would consider his interests against revocation—in that event the trust could not be revoked. Cf. *Smith v. Commissioner,* 59 F. (2d) 56 (C.C.A. 1st); *Jones v. Commissioner,* 27 B.T.A. 171; and *Litchfield v. Commissioner,* 39 B.T.A. 1017.

The taxpayer relied in the Court below on *Bromley v. Commissioner,* 66 F. (2d) 552 (C.C.A. 3d), and *Crossett v. United States,* 30 F. Supp. 802 (C. Cls.), where, as in this case, there were more than one grantor, but it was held that the use of the word "grantor" in the singular in the statute should be construed to mean the plural as well. But our contention is not based upon the plurality of the grantors. Concededly they could revoke the trust if they acted in concert. However, as beneficiaries their interests were adverse and therefore it would seem that Section 166 of the Internal Revenue Code does not apply in this case.

CONCLUSION.

The District Court erred in concluding that the taxpayer trust is not an association taxable as a corporation within the meaning of Section 901 (a)(2) of the Revenue Act of 1938 and Section 3797 (a)(3) of the Internal Revenue Code.

In the alternative, the District Court erred in concluding that the trust was not taxable (on its undistributed income for 1938) as an ordinary trust.

The judgment entered by the District Court is erroneous and should be reversed.

Dated, August 5, 1946.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

Revenue Act of 1938, c. 289, 52 Stat. 447:

Sec. 901. DEFINITIONS.

(a) When used in this Act—

* * * * * * *

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * * * * * *

Internal Revenue Code:

Sec. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * * * *

(3) *Corporation.*—The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * * * * * *

(26 U.S.C. 1940 ed., Sec. 3797.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

These Regulations are applicable to the years 1939, 1940 and 1941. The Regulations applicable to the taxable year 1938 are Regulations 101, Art. 901-3, the provisions of which are identical with those of the Regulations hereinafter quoted.

Sec. 19.3797-3. *Association distinguished from trust.*—The term "trust" as used in the Internal Revenue Code, refers to an ordinary trust,

namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph there is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantage of those forms or organization without their disadvantages. The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust. The purpose will not be considered narrower than that which is formally set forth in the instrument under which the activities of the trust are conducted.

If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the bene-

ficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Internal Revenue Code as a corporation. However, the fact that the capital or property of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advanages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer", the use of a "seal", the issuance of ceraificates to

the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws", the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Internal Revenue Code disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.

No. 11,322.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Trustee,

Appellee.

BRIEF FOR APPELLEE

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No. 11,322.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Trustee,

Appellee.

BRIEF FOR APPELLEE

Jurisdiction.

Appellee concurs in the statement of jurisdiction made by Appellant. (Appellant's Br. pp. 1 and 2.)

Statement.

This action was commenced in the District Court with the filing of a complaint for the recovery of income, excess profits, defense and capital stock taxes paid by Appellee to Appellant. [R. 2.] The total amount of said taxes is $5,474.97, together with interest thereon from the respective dates of payment. [R. 23-24.]

The complaint contains seven causes of action, each of which is bottomed on the same set of facts, except as to the year and kind and amount of tax involved. [R. 2-23.]

This action was submitted to the court below on a written stipulation of facts [R. 95-109], to which were attached Exhibits "A" to "K" [R. 109-155], and on oral testimony. [R. 156-171.] The stipulation of facts, together with the Exhibits "A" to "K," was incorporated in the court's findings of fact and each fact so stipulated was by reference found as facts. [R. 172.] The facts so found are as follows:

On or about the 28th day of January, 1926, at Bakersfield, California, fourteen persons as trustors entered into a trust agreement with the Security Trust Company, as trustee, and conveyed to the trustee certain real property, and on June 23, 1937, a supplemental agreement was executed by eleven of the original trustors and one new trustor, wherein it was agreed that the Bank of America National Trust and Savings Association was the successor of the said Security Trust Company and had succeeded as trustee of said trust. [R. 96-97, 124.]

The real property conveyed to the trustee was to be held by the trustee (also called the payee) as security for the payment to it of the sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, and interest thereon, and for the payment to said payee of such other loans and advances as may be made by the payee during the continuance of the trust to the board of managers. Each trustor agreed that he, his successors and assigns, should be severally liable to the payee for the payment of the balance due on the note or notes in the proportion set opposite his name, as beneficiary. [R. 111-112.]

The trust provided for a board of managers consisting of three beneficiaries of the trust who were vested with the powers and responsibilities provided therefor in the trust instrument. The members of the board of managers

were named in the trust itself. [R. 111.] The board held office at the pleasure of the majority in interest of the beneficiaries of the trust, and such majority filled any vacancy. [R. 111.] The only powers of said board were: (1) To receive loans and advances from the trustee and to execute notes therefor [R. 111-112]; (2) To enter into agreements with the trustee as to the manner of subdividing and improving the real property [R. 112]; (3) To prepare a map of any such subdivision [R. 112]; (4) To enter into agreements with the trustee as to the minimum selling prices of any of said real property [R. 112-113], but this power was not exclusive. [R. 113.]

The trust set forth the powers of the trustee: To hold said property as security for the payment of the said loan or loans [R. 111-112]; to subdivide and sell the said property by lot or lots free of the lien of the payee upon such terms and conditions and for such prices as the trustee deemed best, but for not less than the prices agreed upon by the trustee and the board of managers or the selling agent and for not less than that portion of the amount then due the payee that the area of the parcel sold bears to the unsold parcels of all said property [R. 112-113]; to receive the proceeds of any such sale [R. 113]; to distribute the cash proceeds from the execution of the said note or notes or from the sale of the lot or lots in a certain and definite manner as set out in Paragraph IV of said trust [R. 113-114]; to declare a default for non-payment of the debts secured by the said trust and sell the property at a trustee's sale and distribute the proceeds of such sale. [R. 117-120.] No other powers and no discretions are provided or given the trustee.

There was not a free and easy method of transfer of beneficial interests, as no sale or transfer was valid or

binding on the trustee unless and until an executed original of the assignment evidencing such sale or transfer was filed with the trustee. [R. 115.]

The trust expressly made the beneficiaries liable for their respective proportions of the principal and interest of all loans, liens, and encumbrances against the property of the trust, all taxes, insurance, assessments, liens or charges or expenses necessary or proper for the preservation, maintenance and care of the said property or title thereto, and the costs, charges and expenses of said trust, together with all other sums or amounts properly payable by them in connection with said trust, the property therein described or the beneficial interests thereunder. [R. 112, 116.]

The trust agreement provided for the revocation of the trust by the beneficiaries (who were also the trustors) upon the repayment of all loans and other moneys due the trustee, and in such event the trustee was required to convey and deliver to the then beneficiaries under the trust, as their interests might appear, the title to all the real property then vested in the trustee. [R. 121.]

The beneficiaries of said trust were the beneficial owners of the real property covered by said trust, and their interests were not merely personal claims. [R. 114-115.]

There were no provisions in said trust for the appointment of successor trustees; and no provisions for the taking in of additional capital or members. [R. 109-123.]

The trust had no offices; it had no officers, except as the board of managers might be so construed to be [R. 172]; the trust issued no shares, or certificates, or other evidence of interest therein and had no stock ledger, or stock certificate book, or any books in lieu thereof; it had no

seal, by-laws or minute book; it had no employees other than the board of managers and selling agent; it held no meetings. [R. 173.] The foregoing facts were based on the testimony of the assistant trust officer of the Bank of America National Trust and Savings Association, who also testified that the board of managers never organized [R. 161] and that the trustee sought advice and instructions from the beneficiaries of the trust as to its actions. [R. 163.]

The court further found as to the amount of tax payments made by the trust, fully itemized as to amount, kind of tax and the dates of the respective payments thereof, the filing of the claims for the refund thereof and the rejection of said claims by the Commissioner of Internal Revenue, and notice thereof to the trustee. [R. 97-109.] Copies of the claims for refund, the rejections and notices thereof were attached to the stipulation of facts and found by the court to be true and correct copies and incorporated into the findings of fact. [R. 128-155, 172.]

At the trial of the instant matter, on stipulation, defendant below filed its amended answer, setting up a claim for the tax for the calendar year 1938 against the trust on its undistributed income, in the event the trust was found not to be an association taxable as a corporation. It was further stipulated that the new matter was deemed to be denied by plaintiff below. [R. 157-159.]

Upon the foregoing findings of fact, the District Court concluded in favor of plaintiff below on all issues and further concluded plaintiff was entitled to judgment for the refund of the taxes paid, with interest from the respective dates of payment. [R. 173-174.]

Corrections of Errors in the Transcript of Record and the Brief for the United States.

Although the transcript of record is properly entitled and prepared certain of the pages are entitled "David T. Honeyman, *et al.,* vs." The name "David T. Honeyman, *et al.,"* is an error and should be "United States of America." The printed matter appearing on said pages so entitled is a correct portion of the transcript of record in the instant case.

In the Brief for the United States point 6 of "Statement of Points to Be Urged" all after the comma reading ". . . and in entering judgment for defendant and in not entering judgment for plaintiff" is reversed. (Appellant's Br. p. 9.) The words "plaintiff" and "defendant" should be reversed.

Questions Presented.

1. Was the taxpayer an association taxable as a corporation under the provisions of Section 901(a)(2) of the Revenue Act of 1938, c. 289, 52 Stat. 447, for the year 1938, and Section 3797(a)(3) of the Internal Revenue Code for the years 1939 to 1941, inclusive?

2. If the answer to question 1 is in the negative, is taxpayer taxable as a trust on its undistributed income for the year 1938 under Section 162 of the Internal Revenue Code, or is it exempt under Section 166 of the Internal Revenue Code?

Summary of Argument.

The taxpayer is not an association taxable as a corporation because it was created to secure the repayment of a loan and to liquidate property owned by certain individuals.

It was not created to conduct a business enterprise for profit.

The trust here involved does not have the features of a corporation in that: (1) While title is in a trustee, there is no provision in the trust for succession; (2) There is no centralization of management. It is divided by the provisions of the trust agreement between the trustee, the selling agent and the board of managers in like manner as was provided in the trust agreement in the case of *A. A. Lewis & Co. v. Commissioner,* 301 U. S. 385, 57 S. Ct. 799, 81 L. Ed. 1174; (3) There is no provision in the trust agreement providing for security from termination or interruption by the death of any of the beneficiaries, although like almost all ordinary trusts it is secure from such termination; (4) There is no facility of transfer of beneficial interests and no provision for taking in new participants or capital. The transfer of any interest of a beneficiary is restricted and limited by specific provisions of the trust agreement; (5) Personal liability is specifically imposed on the beneficiaries by the provisions of the trust agreement.

The trust is not taxable on its undistributed income under Section 162 of the Internal Revenue Code, since the grantors acting alone have the power to revoke it and hence the income is taxable to the trustors under Section 166 of the Internal Revenue Code.

ARGUMENT.

I.

The Taxpayer Trust Is Not an Association Taxable as a Corporation Within the Meaning of the Applicable Internal Revenue Laws.

The answer to the opposed contentions of the Government and the taxpayer turns upon an analysis of the findings of fact in the light of the law laid down by the Supreme Court of the United States in *Morrissey v. Commissioner,* 296 U. S. 344, 56 S. Ct. 289, 80 L. Ed. 263, and the three companion cases, *Swanson, et al. v. Commissioner,* 296 U. S. 362, 56 S. Ct. 283, 80 L. Ed. 273; *Helvering v. Coleman-Gilbert Associates,* 296 U. S. 369, 56 S. Ct. 285, 80 L. Ed. 278; *Helvering v. Combs,* 296 U. S. 365, 56 S. Ct. 287, 80 L. Ed. 275.

It is now well established that the foregoing decisions laid down two primary tests in the determination of the taxability of a trust as an association (a) The trust must have been created and maintained as a business enterprise for profit or gain; and (b) It must have the salient features of a corporation.

(a) The Trust Was Created for Non-business Purposes.

(1) It was created to secure the repayment of a loan.

The purpose for which the instant trust was created is clearly and unequivocally stated in Paragraph II of the trust instrument, as follows:

> "The Trustee, hereinafter sometimes called the payee, shall hold said property as security for the payment to it of the sum of Fourteen Thousand Dollars ($14,000.00) . . ." [R. 111.]

The trust then was formed to provide security for the repayment of a loan—a most common procedure in California, and one which is provided for in the Civil Code of California. Chap. 2, Title 14, Part IV, Division III, Section 2290, *et seq.*

Indeed it is common knowledge, of which we submit this Court may take judicial knowledge, that trust deeds as security for the repayment of a loan are used in California to the almost, if not, complete exclusion of mortgages. Should there be any doubt of this statement a reference to Cal. Jur., Supp., Sections 101, 102 and 103, will disclose that in the nineteen-year period from 1926 to 1945 there were but six cases reported involving foreclosure of a mortgage, and each of them involved a construction of a grant as a mortage. If California was not so predominantly a "Trust Deed" state but was a "Common Law" state, a mortgage would have been given as security for the repayment of the loan and a trust would never have been created. In such event, we submit, the question of the taxability of the trust or mortgage as a corporation would not have arisen.

In *Porter v. Commissioner,* 130 F. (2d) 276, this Court at pages 279-280 quotes most approvingly from *Fidelity-Bankers Trust Co. v. Helvering,* 72 App. D. C. 1, 113 F. (2d) 14, as follows:

> ". . . But not all trusts are taxable as corporations. Under the pertinent statutes only those engaged in doing business for profit or income are so taxed. A trust does not engage in business, for pur-

poses of the tax, if its sole or *principal* object and activities are: (1) preservation of specified property; (2) liquidation of a trust estate; (3) distribution of income derived from another source. . . ." (Emphasis supplied.)

Had this Honorable Court quoted further, the following would have followed immediately:

> "*Clearly the same rule should apply if its function is exclusively to service the security of a loan.* The ultimate question is whether the trust performs *some non-business function of this sort* or operates a business enterprise as a going concern." (Emphasis supplied.)

The foregoing case is the only one dealing with a trust to service a loan which we have been able to find since the Supreme Court rendered its decisions in *Morrissey v. Commissioner, supra,* and companion cases.

However, in *Commissioner v. McCormick,* 68 F. (2d) 653, decided before *Morrissey v. Commissioner,* the Court held the trust there involved was not engaged in business for profit where a trust of real property was formed and beneficial certificates were issued. The beneficiaries were unwilling to mortgage the real property, but hypothecated the certificates as security for a loan.

That the instant trust was primarily formed as security for the repayment of a loan is amply borne out by Paragraph VII of the trust agreement [R. 117-120] which provides for the sale of the property by the trustee in the event of default in the payment of the loan—a provision found in all trusts given as security for the repayment of a loan (25 *Cal. Jur.* 8, 9)—and which is in accord

with the provisions of Section 2924 of the Civil Code of California.

We respectfully submit that the trust was "created and maintained" as security for the repayment of a loan, a purely non-business purpose, and was not "created and maintained as a medium for carrying on a business enterprise" for gain, and therefore is not an association taxable as a corporation.

> *Commissioner v. Gibbs-Preyer Trust 1 and 2,* 117 F. (2d) 619;
>
> *Pieroni Building Trust, etc. v. Commissioner,* 45 B. T. A. 157.

(2) The trust is a liquidating trust.

In addition to being a trust for the security for the repayment of a loan, the instant trust is purely and simply a liquidation trust—another purely non-business purpose and function.

> *Fidelity Bankers Trust Co. v. Helvering, supra;*
>
> *Porter v. Commissioner, supra;*
>
> *United States v. Davidson,* 115 F. (2d) 799, 800.

The adjudicated cases, both before and after the Supreme Court decision in *Morrissey v. Commissioner* are unanimous in holding that a liquidation trust is not an association taxable as a corporation.

In *Morrissey v. Commissioner, supra,* at page 296 (56 S. Ct.), Mr. Chief Justice Hughes points out that the trust there in question: ". . . was not a liquidating trust."

In *United States v. Davidson,* 115 F. (2d) 799 (cited with approval by this Honorable Court in *Porter v. Com-*

missioner, supra), the trust provided that the primary purpose of the trust was to convert the trust property into cash and distribute the net proceeds to the beneficiaries who owned certificates of shares in the trust. The Court held the trust was a liquidation trust and hence not an association taxable as a corporation.

In *Girard Trust Co. v. Commissioner,* 34 B. T. A. 1066, the Board, in holding the trust there involved was a liquidation trust, said at page 1069:

> "Subdivision was the only effective way of disposition, and to have the deed to each lot executed by all interested individuals would have been too cumbersome. The fact that in the process of liquidation they sought the best price—if possible a profit—and were financially able to resist immediate sale at less than a fair value does not stamp the liquidation as a business enterprise."

In *Broadway-Brompton Building Liquidation Trust, etc. v. Commissioner,* 34 B. T. A. 1089, the petitioner trust was formed by bondholders to take over two defaulted mortgages for the purpose of acquiring and selling the assets covered by the mortgages and distributing the net proceeds to the bondholders. The trust issued certificates in direct relation to the bonds contributed. The trust provided for Trust Managers. Powers to operate the properties pending sale thereof was provided, liability was limited to the property embarked on the undertaking; certificate holders were given a beneficial interest in the net income coming into the hands of the Trust Managers and Trustee only.

The Board held the trust was a liquidating trust and held it was not an association taxable as a corporation. The Board in answer to Commissioner's contention that the activities of the trust in renting the properties for profit indicated a business purpose, said at page 1093:

> "The law does not require that in liquidating a property the owner must abandon all ordinary business judgment and sacrifice the property immediately without regard for condition of the market or amount of loss. The liquidation is to be accomplished with reasonable regard for all surrounding circumstances. These circumstances may vary with the type of property and the state of the market."

In *Frederick Pitzman, et al., Trustees v. Commissioner,* 36 B. T. A. 81, the Board in holding the trust there involved was a liquidating trust cites the two foregoing cases and says at page 92:

> "In each proceeding we held that the trust was taxable as a trust, because each trust was created for liquidation purposes and not to enter into a business enterprise."

The language used in the trust in *United States v. Davidson, supra,* at page 800 was held by this Honorable Court in *Porter v. Commissioner, supra,* at page 280 to clearly result in the creation of a liquidation trust.

The language which the Board refers to in the *Pitzman* case, *supra,* as showing the trusts there involved were liquidating trusts is: ". . . to dispose of the realty in such times and such manner as the trustees deem to be to the best interest of the beneficiaries" and ". . . the trustees are given absolute control of the trust estate for the purpose of alienating the same."

In the *Broadway-Brompton* case, *supra,* the Board, in holding the trust was a liquidating trust, refers to the fact:

> "The trust agreement contains no provision for continuing business but the trustee is required to distribute the proceeds of the operation and liquidation of the property."

So, in the instant trust, we find like provisions as follows:

The trustee is

> "To sell said real property by lot or lots free of the lien of the Payee hereunder, upon such terms and conditions, to such purchasers, for such prices and payable in such manner as said trustee may deem best, . . ." [R. 112-113.]
>
> "To receive the proceeds arising from the sale of said property." [R. 113.]
>
> "To distribute the cash proceeds arising from the execution of said note or notes or from the sale of lot or lots hereunder as follows:"

after payment of costs, expenses and fees of trustees and selling agent, amounts required to procure release of liens, bills against said property and amounts to the Payee of the note referred to in Par. II [R. 111-112] the balance to the beneficiaries. [R. 113-114.]

There are no provisions in the trust agreement for continuing business, no power to invest or reinvest the trust corpus or income, but the trustee must distribute the proceeds of the sales, *i. e.,* the liquidation of the trust corpus.

The trust here involved, it is submitted, is a liquidation trust and therefore was not created or maintained for a

business enterprise and hence is not an association taxable as a corporation.

The government maintains that the instant trust was created to engage in a business enterprise. It quotes from *Morrissey v. Commissioner* on pages 13 and 14 of its brief and then *concludes* that the instant trust was clearly purposed for the carrying on of a business enterprise for profit or gain, quoting at the bottom of page 14 from *Morrissey v. Commissioner.* This is exactly the same argument made in the *Frederick Pitzman* case, *supra,* at page 94, but of which the Board said ". . . each of these is grounded upon the facts in the case decided," and held the trusts there, even though dealing in real estate and constructing improvements, were liquidation trusts.

And in the *Broadway-Brompton* case, *supra,* the Government bottomed its contention as here and the Board held, even though the trust was actually renting its property pending sale, that it was a liquidation trust.

A subdivision was involved in the trust which the Supreme Court considered in *A. A. Lewis & Co. v. Commissioner,* 301 U. S. 385, 57 S. Ct. 799, 81 L. Ed. 1174, and wherein there was "dealing in real estate, the development of a tract of land, and construction of improvements . . ." yet the Supreme Court held the trust was not created or maintained to engage in a business enterprise for profit.

Obviously, we think, it is necessary to have more than a trust corpus consisting of real estate to constitute an engagement in a business enterprise.

The Government throughout its brief makes such unsupported conclusions as appear at the top of page 15, "It is clear, moreover, that the primary purpose for

organization of the trust was to improve, subdivide and sell a tract of land at a profit, which was a definite business enterprise." Yet in the very next paragraph in stating the *facts* the Government says the trustee was to "hold the real property as security for that loan. . . ." This last quotation from the Government's brief is a clear statement of *fact* as opposed to the Government's conclusion, of the purpose for the formation of the instant trust.

Following an analysis of the trust provisions the Government turns to cases dealing with the question what constitutes *doing business* by a *corporation* for the purposes of the capital stock tax.

We respectfully submit that such cases as are cited on page 18 of the Government's brief dealing with the above question are not in point: (1) Because the very question which is in issue herein is the postulate upon which the Court's decision is made in such cases. In the capital stock cases there *is* a *corporation* formed for a certain given purpose and the only question is—Is the corporation performing that activity, however, slight, for which it was formed? If so, it is doing business within the meaning of the capital stock tax provisions. So held this Court in *Section Seven Corp. v. Anglim,* 136 F. (2d) 155 at 158.

In the instant matter the primary question is—What is the principal purpose for which the trust was formed—a business or a non-business purpose?

In the capital stock tax cases it matters not why the corporation was formed *so long as it is doing that for which it was organized.*

For example—as shown above and concurred in by the Government on page 21 of its brief—a *trust* formed to

liquidate an estate is not formed for a business purpose and hence is not an association taxable as a corporation. Yet for the purposes of the capital stock tax a *corporation* formed to liquidate an estate and performing that activity is held to be "doing business" and hence subject to the capital stock tax.

> *Magruder v. Washington, B. & A. Realty Corp.*, 316 U. S. 69; 62 S. Ct. 922; 86 L. Ed. 1278.

See, also:

> *United States v. Western Shore Lumber Co.*, 136 F. (2d) 628.

In every case dealing with the capital stock tax cited by the Government in its brief, the *corporation* was doing that for which it was organized and as said by the Supreme Court in *Edwards v. Chile Copper Co.*, 270 U. S. 452, 455; 46 S. Ct. 345, 346; 70 L. Ed. 678, in holding the corporation subject to the tax there involved: "It was organized for profit and was doing what it principally was organized to do in order to realize profit."

To say in the instant case that the trust is an association because it was doing what it was organized to do is to beg the question since the question whether it is an association must turn on a determination of what it was organized to do.

The question of what constitutes "doing business" by a corporation being one of degree depending on the purpose of the inquiry, whether to subject the corporation to process in a foreign jurisdiction, to subject it to tax, or subject it to qualifying in a foreign state, decisions dealing with the question must be limited to the purpose of the inquiry.

See *Prentice-Hall State and Local Tax Service* (Cal.), Vol. 1, paragraph 7202, *et seq.,* for a full discussion thereon.

We would like to pose the question whether, with the many decided cases dealing with the question here involved—when is a trust an association taxable as a corporation—is it not odd that the Government has not cited even one such case dealing with "business purpose" in support of its contention that the instant trust was created as a "business enterprise."

On page 21 of its brief the Government has, we believe, for all practical purposes stipulated to the affirmance by this Court of the judgment rendered below. For there, it cites *Girard Trust Co. v. Commissioner,* 34 B. T. A. 1066; *Broadway-Brompton Building Liquidation Trust v. Commissioner,* 34 B. T. A. 1089; *Pitzman v. Commissioner,* 36 B. T. A. 81 (all three of which have been treated hereinabove) and says of said cases that they ". . . are clear liquidation trust cases with which *we do not disagree since they are correct on their facts. . . .*" (emphasis supplied) and then makes the *unsupported* statement ". . . but in no way analogous to this case." The Government nowhere in its brief attempts to distinguish the said cases, whereas we have demonstrated their similarity to the instant case.

In *Girard Trust Co.* nine persons entered into a trust agreement with Girard Trust Co. as trustee, wherein the trustee received a tract of real property consisting of 54 acres "to manage, develope, improve, grant, bargain, sell and convey the same or any part thereof and to receive, collect and receipt for any and all sums of money whether in cash, or partly in cash and partly in mortgages derived

from such sale or sales thereof; and shall hold any and all such sums . . . (for nine children and transfer it to them in equal parts) . . . less its charges and less any and all proper charges for development and improvement . . ." The trustors reserved an interest only in the proceeds of sale. They bound themselves to pay all taxes, debts, development and other expenses of the tract *pro rata*. They ratified a subdivision contract which the trustee had previously made with a contracting firm. The property was subdivided and sold by lots and one lease was made by the trustee.

The Government made the same contention there as here, citing *Morrissey v. Commissioner, supra,* and its companion cases, and stated "and the fact that from the testimony this trust was created for the purpose of engaging in a business for profit and was engaged in subdividing real estate, the purpose of which was to acquire larger profits."

The Board held the trust was a liquidating trust.

Wherein lies the difference between that case and this, except in the *Girard Trust Co.* case there were nine trustors, here fourteen, there 54 acres, here 40? We submit the language which the Board held sufficient to show a liquidation purpose is no different than the language in the instant trust and the similarity of the cases is obvious. By its agreement with the decision in the *Girard Trust Co.* case, the Government must perforce agree with the District Court's judgment herein.

We have already dealt sufficiently of the *Broadway-Brompton* case to show that the instant case is a *far* stronger case for taxpayer than the cited case for in the cited case the trustee and trust managers issued certifi-

cates, here none are provided for and none issued, there two three-story store and apartment buildings and a 350-car capacity public garage were actually operated pending sale.

And so with the *Pitzman* case.

Since the Government, although making the same arguments there as here, agrees that the Board of Tax Appeal's decisions in those cases are correct, we submit the facts of the instant trust bring this case well within the facts and decisions rendered therein, and here as there this trust is a liquidation trust and hence not an association taxable as a corporation.

Willis v. Commissioner, 58 F. (2d) 121, cited on pages 21 and 11; *Sloan v. Commissioner,* 63 F. (2d) 666, cited on page 11, and *Merchants Trust Co. v. Welch,* 59 F. (2d) 630, page 27 of the Government's brief, were decided long prior to *Morrissey v. Commissioner, supra,* and hence are no longer authoritative.

> *Porter v. Commissioner* (9 Cir.), 130 F. (2d) 276, 280.

We have already shown that *Magruder v. Washington B. & A. Realty Corp.,* 316 U. S. 69, is not only not controlling herein as claimed on page 23 of the Government's brief, but is not even pertinent herein since it is a capital stock tax case dealing with what constitutes "doing business."

Concluding this point, we respectfully submit that appellee was not created or maintained as a business enterprise for profit or gain but was purely a trust deed given as a security for the repayment of a loan and a liquidation trust, and hence is not an association taxable as a corporation.

(b) The Trust Has None of the Salient Features of a Corporation.

The Supreme Court in the *Morrissey* case, *supra,* lays down five salient features which make a trust analogous to a corporation. They are:

(1) Title to the property held by trustees as a continuing body with provision for succession.

Title is held by the trustee as in all trusts, but there is no provision in the trust agreement for succession. Appellant admits this, but claims it is of no consequence because the "corporate nature of the trustee has the element of continuity inherent in itself." But there is a difference between "a continuing body" and "provision for succession." Else why did the Supreme Court use both terms? The Court meant by "provision for succession" a provision in the trust agreement for the Court says "whether the trustees are named in the trust instrument with power to select their successors . . . or are selected by or with the advice of those beneficially interested. . . ."

In the *Morrissey* case and in *Helvering v. Coleman-Gilbert Associates, supra,* the trust instrument provided for the trustees to select their successors.

(2) Centralization of management in trustees who act "in much the same manner as directors."

There is no centralization of management herein. It is divided by the provisions of the trust between the trustees and the selling agent and the board of managers in like manner as was provided in the trust agreement in the case of *A. A. Lewis & Co. v. Commissioner,* 301 U. S. 385, 57 S. Ct. 799, 81 L. Ed. 1174, and the trustors, who re-

served the right to rent the property, to procure insurance, pay principal and interest of any debt, taxes or assessments levied or assessed against the trust property. [R. 116.]

The very things referred to on page 24 of appellant's brief were held by the Supreme Court in the *A. A. Lewis Co.* case, *supra,* to be "purely ministerial." The same powers as are provided in the instant trust were present in the *A. A. Lewis Co.* trust as will be shown later herein, and the Court said these powers gave "no essential characteristic of corporate control. . . ."

Appellant completely ignores the selling agent and his powers and those which were reserved by trustors.

(3) Security from termination or interruption by the death of owners of the beneficial interests.

The instant trust, like almost all ordinary trusts and many limited partnerships, is secure from such termination—although there is no provision in the trust instrument to that effect.

In the *Morrissey* case, the trust itself provided that the death of a trustee or beneficiary was not to terminate the trust.

(4) Facility of transfer of beneficial interests and introduction of large numbers of participants.

Not only is there no facility of transfer of beneficial interests, but the transfer is specifically limited and restricted by the provisions of Paragraph VI of the trust. [R. 115.]

With like provisions in the trust regarding assignment of beneficial interests, this Court in *Commissioner v. Gerstle,* 95 F. (2d) 587, said at page 589:

> "Two of the characteristic advantages of corporate organization have been generally thought to be the limited liability of the members, and a ready divisibility and transferability of beneficial interests, making toward the inclusion in the enterprise of large numbers of participants. . . . Their beneficial interests were not readily or conveniently transferable."

The exact condition is true of the transferability of the interests in the instant trust.

In the *Morrissey* case there were certificates issued which were readily transferred the same as stock of a corporation.

(5) Limitation of personal liability of the participants *to the property embarked in the undertaking.*

In the *Morrissey* and companion cases the trusts provided that the trustees were "without power to bind the beneficiaries personally by 'any act, neglect or default' and the beneficiaries and all persons dealing with the trustees were required to look for payment or indemnity to the trust property."

It is noted that the Supreme Court in the *Morrissey* case says limitation of personal liability "to the property embarked in the undertaking."

Every case which we have found, save one, refers to this same type of limitation of personal liability. For example, this Court in *Commissioner v. Gerstle, supra,* at 589, with reference to the *pro rata* liability of the mem-

bers for all expenses, loans and losses of the syndicate, said: "The liability of the syndicate members was not limited."

The exception to this general holding by the Courts above referred to is this Court's decision in *Commissioner v. Security-First National Bank,* 148 F. (2d) 937, wherein this Court held such *pro rata* liability is the equivalent of limited liability and appears to give as its reason therefor that California Civil Code Section 331 comprehends such assessment of corporate shareholders.

This Court's decision in the latter case appears to be in conflict with its decision in the *Gerstle* case.

We respectfully submit that this Court's decision in the *Gerstle* case is in harmony with the Supreme Court's decision in the *Morrissey* case, while the decision in the *Security-First National Bank* case appears to be in conflict with the *Morrissey* case wherein the limitation of personal liability had reference to the liability being limited to the property originally embarked in the undertaking and also appears to be in conflict with *Burk-Waggoner Oil Association v. Hopkins,* 269 U. S. 110, 46 S. Ct. 48, 70 L. Ed. 183, in applying local law, to-wit, California Civil Code, Section 331. In the *Burk-Waggoner* case the Court held that local law would not be recognized in determining the taxability of the taxpayer as an association.

The *Burk-Waggoner* case has been held to be authority that local law is not controlling in the matter of Federal taxation.

> *Walter A. Frederick,* 2 T. C. 936, 945;
>
> *Coast Carton Co.,* 149 F. (2d) 739, 742 (9th Cir).

The reason is clear. Suppose the Delaware law does not permit such stockholders' assessment as does California Civil Code Section 331, then a trust in Delaware with provision for *pro rata* liability of the members would not possess this feature of a corporation, but a California trust with like provisions would, and this conceivably could mean the difference between a trust being an association in California while not being such in Delaware.

We respectfully submit that this Honorable Court should adhere to its decision in the *Gerstle* case and refute its holding in the *Security-First National Bank* case.

Frederick Pitzman, 36 B. T. A. 81, 92.

In *A. A. Lewis & Co. v. Commissioner, supra,* the Supreme Court, in speaking of its decision in the *Morrissey* case with respect to the salient features, said:

> "We pointed out that the corporate analogy was evidenced by centralized control, continuity and limited liability, as well as by the issue of transferable certificates."

And the Board of Tax Appeals in *Pitzman v. Commissioner, supra,* at page 92, in speaking of the salient features found present in the trusts there involved, said: ". . . yet these salient features have been found in ordinary trusts without making them associations taxable as corporations."

The next case dealing with the instant question to reach the Supreme Court of United States following the *Morrissey* and companion cases, *supra,* was *A. A. Lewis & Co. v. Commissioner,* 301 U. S. 385; 57 S. Ct. 799; 81 L. Ed. 1174. The *Lewis* case is peculiarly analogous to the instant case and is, we submit, controlling herein.

Appellant seeks to distinguish the *Lewis* case by the fact that there was but one grantor and only two beneficiaries. This difference is without merit for in *Swanson v. Commissioner, supra,* a companion case to the *Morrissey* case, there were but two beneficiaries involved and the Court said the limited number of persons involved does not alter the situation. And this Court in *Lombard Trustees, Limited, et al. v. Commissioner,* 136 F. (2d) 22, wherein there was only *one* beneficiary, said at page 23:

> "There is no merit in this contention. We regard the plural word 'beneficiaries' as inclusive of the singular."

In *Lombard Trustees, supra,* the taxpayer was contending exactly what the Government is contending with respect to the *Lewis* case, namely, that with only one beneficiary there can be no association.

See, also, *Harry Chandler, Prentice-Hall T. C. Memo Cases,* Paragraph 46,164, to the same effect.

This argument loses entire face when it is remembered that the trust in the *Lewis* case provided for the issue of transferable certificates, thus permitting of the introduction of a large number of participants, if the parties so desired.

Except for that one contention, there is no factual difference between the *Lewis* case and the instant case, save that the Lewis trust was formed for the express purpose of subdividing the trust corpus, while the instant trust was formed for the express purpose of securing the repayment of a loan.

The facts in the *Lewis* case, *supra,* are:

A tract of real property was conveyed to a trustee for the purpose of subdividing and selling it. The original trustee was succeeded by the Central Republic Trust Company as successor to said original trustee. The grantor and A. A. Lewis were named the beneficiaries, both of whom signed the instrument as beneficiaries. A. A. Lewis was appointed the manager and selling agent of the trust. He was given "such powers and duties in connection with the administration of the trust as may be necessary to facilitate the sale of said land." The trustee was to execute deeds and other necessary instruments on Lewis' request. The trustee was to collect and distribute the proceeds of sale. Lewis was to receive as compensation a commission based on the prices for which lots in the subdivision were sold. The grantor subsequently assigned her beneficial interest in the trust. The trust instrument provided for the issuance of transferable certificates by the trustee but none were ever issued.

Let us compare the trust here involved with the trust involved in the *Lewis* case, *supra.*

(A) Each trust had a corporate trustee, which was succeeded by a successor corporate trustee. Each trust empowered the trustee to (1) hold title to real property [R. 111]; (2) execute deeds and other necessary instruments on request of the selling agent [R. 120-121], and collect and distribute the proceeds of such sales [R. 113-114], (3) to subdivide the property as agreed on between the trustee and managers or selling agent. [R. 112-113.]

(B) Each trust had managers and a selling agent, who were named in the trust agreement and whose powers were definitely fixed in advance of their exercise—but the

powers of the manager and selling agent in the *Lewis* case were far broader than in the instant trust—for in the *Lewis* case his powers were to do whatever was necessary to facilitate the sale of said land. The only compensation provided in each trust for the managers or selling agents is a commission for the selling agent on the sale of the property, or parts of it.

(C) Each of said trusts provided for the subdivision and sale of specific property transferred to the trustee.

(D) In each, beneficial interests were assigned.

There are, however, two main differences in the two trusts—first, the Lewis trust was created solely and specifically to subdivide and sell real estate; the instant trust was created to secure the repayment of a loan; and second, the Lewis trust provided for the issuance of transferable certificates (though none were issued), a method by which new capital and participants could have been taken in, while in the instant case no provision was made for issuance of transferable, or any other type of certificates.

Thus the facts of the instant case would appear to be stronger in favor of the taxpayer and in resolving the issue in its favor—the trust is *not* an association taxable as a corporation.

As the Court pointed out in the *Lewis* case:

> "The arrangement here answers the . . . description of an ordinary trust—that is, it was created in virtue of a declaration by which a designated piece of real property was conveyed to the trustee on specified trusts, for the benefit of definitely named persons . . . for the sole purpose of subdividing and selling the land. The agent was designated by

name and his powers definitely fixed in advance of their exercise. He possessed no authority beyond that expressly delegated by his principal. The trust was adopted merely as a convenient means of making effective the sales of the agent under the contract. The duties of the trustee were purely ministerial. . . ."

Lewis v. Commissioner, 57 S. Ct. 801.

The Supreme Court held on the foregoing facts that the trust in the *Lewis* case was *not* an association taxable as a corporation and said:

"If it were not for the declaration of trust, we should have here the simple case of an appointment by a land owner of an agent to subdivide the land and sell it, receiving as compensation for his services a fixed percentage of the payments made by the purchasers. It is quite evident that such an arrangement has no element of substance or method which would warrant its designation as an association under the statutory provision in question. Nor can we see that the intervention of a *trustee to hold title, execute contracts and conveyances* at the direction of the real estate agent *and make collections* alters the situation." (Emphasis supplied.)

Lewis v. Commissioner, 57 S. Ct. 800.

The Court, after citing the *Morrissey* case, *supra,* stated:

"The trust reviewed in the *Morrissey* case was essentially unlike that now under consideration."

57 S. Ct. at 800-801.

And again, in summing up its holding, the Court said:

> "There is to be found in the operation of the business no *essential characteristic of corporate control* —nothing analogous to a board of directors or shareholders, *no exemption from personal liability, no issue of transferable certificates of interest.* There is simply the common relation of principal and agent, coupled with the collateral incidents of an ordinary trust." (Emphasis supplied.)
>
> 57 S. Ct. 801.

The similarity of the instant case and the *Lewis* case having been demonstrated by a comparison of the trust instruments, we submit, the Supreme Court's statements and holding are equally applicable in the instant matter except as to the purpose which, as stated, in the instant case was primarily to secure a loan and only incidentally to subdivide the land, while in the *Lewis* case was solely to subdivide and sell the land.

In the instant case, as in the *Lewis* case, as said by the Supreme Court, there is nothing analogous to a board of directors or shareholders, no exemption from personal liability, no issue of transferable certificates of interest. *Not one power is given in the instant trust that was not given in the Lewis trust, except as to the loan.*

It is noteworthy, we believe, that the Government in its brief does not distinguish the trust in the *Lewis* case from the instant trust, but distinguishes it from the trust in the *Morrissey* case. We readily agree that the *Lewis* trust is entirely distinguishable from the *Morrissey* trust. Our comparison of the *Lewis* trust and the instant trust, *supra,* shows conclusively, we submit, that the instant

trust is equally distinguishable from the *Morrissey* trust and very analogous and similar to the *Lewis* trust.

In *Commissioner v. Gerstle,* 95 F. (2d) 587, this Honorable Court held the syndicate trusts there involved were not associations taxable as corporations.

The facts in the *Gerstle* case, *supra,* were:

The members of the syndicate were directors of corporations owning large department stores in San Francisco and Oakland. In 1927 it was decided to build a new store in Oakland some distance from the then business district. The members of the syndicate decided to purchase some property in the vicinity of the proposed store in order to realize profits from the expected rise in land values. The original plan was expanded to purchase other properties in Oakland in anticipation of a general rise in real estate values. Accordingly, four syndicates were formed, the members contributing to a pool to finance the purchases. The agreements recited that the members were desirous of acting jointly in the purchase, management and sale of real properties in Oakland and appointed syndicate managers to act as agents and trustees. It was agreed that the managers should have complete discretion in the purchase of the properties, the selection thereof and the price to be paid, the details of management and the terms of sale, etc. and all other matters relating to the syndicate. They were liable *pro rata* for all expenses, loans and losses of the syndicate. Syndicate managers were chosen by the members. Assignments of interests in the syndicate were restricted. No certificates or other evidence of beneficial interest were provided for or issued. The anticipated rise in prices did not occur and the syndicate managers oper-

ated certain of the buildings and rented the remaining unimproved properties.

The syndicates, as such, had no name. There were no officers, except as the managers might be so considered. The agreement provided the sole evidence of the several members. The practice was to decide all questions of importance only after the views of the members were obtained. The managers did not organize. The bank, as fiscal agent, kept all records. The funds advanced by the bank both for the acquisition and subsequent maintenance of the properties were secured by declarations of trust covering the syndicate assets.

This Court, after citing and quoting from *Morrissey v. Commissioner, supra,* and referring to the five salient features set forth therein (including the reference to limitation of personal liability to the *property embarked in the undertaking*) said at page 589:

> "Certain of these features were present in the syndicates involved . . . continuity of the enterprise was effected, insuring against disturbance resulting from death or transfer of ownership of beneficial interests. Centralized management was provided for in the agreements. . . . In other respects, these syndicates lack analogy to corporations. Two of the characteristic advantages of corporate organization have been generally thought to be the limited liability of the members, and a ready divisibility and transferability of beneficial interests, making toward the inclusion in the enterprise of large numbers of participants. The liability of the syndicate members was not limited. Their beneficial interests were not readily or conveniently transferable."

and later, at page 590, the Court said:

> "It seems clear that the members were equitable owners of the real property acquired, and that their beneficial interests were not merely personal claims against the syndicate managers."

Exactly the same words can be applied to the instant trust, save for the centralized management. The instant trust had no name. There were no officers, except as the board of managers might be so considered. The agreement provided the sole evidence of the interest of the several beneficiaries. The trustee (managers) conferred with the beneficiaries on all important questions. The managers did not organize.

The instant trust had continuity, though not by its provisions as above pointed out, but as in the *Gerstle* case it did not provide limited liability of the beneficiaries and it did not provide for ready or convenient divisibility or transferability of beneficial interests, and the beneficiaries were the equitable owners of the corpus of the trust.

See, also, *Commissioner v. Buckley,* 128 F. (2d) 124, wherein the Circuit Court of Appeals for the 9th Circuit held that an investment trust providing transferable registered trust certificates, continuity of existence, centralized management, and limited liability was not an association taxable as a corporation, citing and agreeing with *Commissioner v. Chase National Bank* (2 Cir.), 122 F. (2d) 540, wherein the Court said at page 543, the trust property was to be held for investment and not to be used as capital to transact a business for profit like a corporation organized for such purposes.

The Government in its brief on pages 27 and 28 cites several cases which it contends fully support its contentions. A brief reference to each of the cases will, we submit, show that they are not one whit in point.

As above pointed out *Merchants Trust Co. v. Welch,* 59 F. (2d) 630; *Willis v. Commissioner,* 58 F. (2d) 121; and *Sloan v. Commissioner,* 63 F. (2d) 666, were all decided long prior to *Morrissey v. Commissioner, supra,* and hence under the authority of *Porter v. Commissioner,* 130 F. (2d) 276, are no longer authoritative.

In *Porter v. Commissioner, supra,* cited at the bottom of page 27 of the Government's brief, the trust was created "to engage in any lawful business," to own, buy, sell, improve, etc. real and personal property, to own stock, engage in any industry or investment, "hoping thereby to make gain to the estate. . . ." Shares of stock in a corporation were transferred to the trust by the stockholders of the James Porter Investment Co. The trustees caused the corporation to be dissolved and took over the assets thereof and operated in like manner as the corporation had operated. The trust provided that the trustees were authorized to add to their number and to choose their successors; the trustees were made absolute owners of the trust with full power of management and in their discretion to reinvest or distribute all trust income and funds collected by them. Beneficial interests called "expectancy fractions" were registered in the records of the board of trustees. The trust provided that the death of a beneficiary should not terminate the trust, but his heirs could succeed to his beneficial interest. Annual meetings of the beneficiaries were provided for. The trust was irrevocable and was to continue for any lawful term within the discretion of the trustees.

Looking to the trust instrument to determine its purpose this Court said that the "trust instrument exhibits authority in the trustees to engage in business" and that there "is here no expressed purpose of liquidation, or of conservation, but an avowed intent 'to engage in any lawful business' in order to realize a gain or profit to the trust estate."

Clearly the *Porter* case is no authority in the instant matter.

Next is *Fidelity-Bankers Trust Co. v. Helvering,* 113 F. (2d) 14, wherein stockholders of a financially embarrassed trust company executed a trust to be known as Fidelity Realty Company "for the purpose of acquiring, encumbering, leasing and selling certain real estate and/or other properties. . . ." The syndicate members subscribed for certain amounts set opposite their names for which they received participating certificates which were transferable by endorsement and delivery. A record of the ownership of the certificates was to be kept. The members elected an executive committee. Liability of the members was limited to the property originally embarked in the undertaking. There was to be no termination on death of a member or transfer of a certificate.

The trustee contended that the trust was merely a security for loans to the trust company.

The Court held that *if* it was such a loan and security trust it would not be an association. But the Court held there was no element of loan or security in the trust. It was purposed to and did purchase and operate the properties rather than receive them under a mortgage or deed of trust.

Again we have a clearly business purposed trust with *every* feature of a corporation provided for. We submit the cited case is as different from the instant case as the *Porter* case, *supra.*

Appellant's next cited case is *Title Insurance and Trust Co. v. Commissioner,* 100 F. (2d) 482.

The trust in that case provided for beneficial certificates transferable by endorsement; provided for a register of certificate holders; provided that no assessment shall be made upon any certificate holder; the trustees were empowered to take such steps as in its opinion may be necessary for the best interest of the certificate holders with respect to leasing, operating, selling, conveying or otherwise disposing of the trust property; trustees, except as otherwise provided, shall have exclusive management and control of the trust estate; provided that neither the trustee nor any certificate holder should be personally liable upon any contract or obligation made by the trustee; provided for appointment of a successor trustee.

The Court held it to be an association, saying at page 485:

> "As disclosed by the trust agreement, its purpose was to carry on the business of owning, managing, leasing and selling real property and sharing the gains therefrom."

The Court found that the *trust agreement provided* for each of the five salient features referred to in the *Morrissey* case.

Here again we have a trust which provides for a successor trustee, provides for full management and control in the trustee, provides the trust shall not terminate on

death of a certificate holder or transfer of a certificate; provides for transferable certificates by endorsement and provides for limiting the liability of the certificate holders to the property embarked in the undertaking. As pointed out above the instant trust provides for *none* of those five features.

Again, we submit the *Title Insurance and Trust Co.* case is no authority on the facts and trust in the instant case.

The next case in the Government's brief is *Commissioner v. Vandegrift R. & Inv. Co.,* 82 F. (2d) 387 (C. C. A. 9th), wherein the trust specifically provided for: Beneficial certificates which were issued and were fully transferable; the beneficiaries retained no interest in the trust property and could only enforce the trust provisions; the trustees to engage in business and empowered them to purchase, sell, lease, manage, improve and develope real estate, to engage in a general contracting and construction business, and were given all the powers incidental to carrying on a business; no assessments being levied against or upon certificate holders; self-perpetuation of trustees with power to fill vacancies and were not subject to control of the beneficiaries; the trust had in earlier years operated a shoe business but had disposed of it prior to the year under consideration. The Board of Tax Appeals had held the trust taxable as a corporation while operating the shoe business but not so taxable after the liquidation of the shoe business.

The Court held that as the trust was organized to carry on a business and as the Board had held it taxable as a corporation in the earlier years, and it was carrying on the same activities, except for the operation of the shoe

industry, it was still so taxable. Among its activities in the years involved were leasing property, acquiring and managing property and accumulating a reserve to build a building if a fire should destroy a rented building.

The Court looked to the trust to determine its purpose and not to what it was doing—but what it could have done.

Certainly the trust in that case, as in the preceding cases, is far afield from the instant case, and is not even persuasive, let alone controlling, in the instant case.

In *Del Mar Addition v. Commissioner,* 113 F. (2d) 410, the trust specifically provided for the trustees to choose their own successors, vested all control and management of the property in the trustees, and that the trust should have continued existence and operation despite the death of a beneficiary. Interests in the trust were transferable.

The trust was created to acquire, develop and sell real estate.

The Court affirmed the Board of Tax Appeals holding that it was taxable as a corporation because of its "striking similarity" to the trust in the *Morrissey* case.

We have already seen how unlike the instant trust is from the *Morrissey* trust, and, hence, how unlike it is from the *Del Mar Addition* trust.

The next case cited by the Government is *Wellston Hills Syndicate Fund v. Commissioner,* 101 F. (2d) 924, of which the Government on page 13 of its brief filed in the District Court said: "A more parallel situation to the case at bar could hardly be found."

The facts of the *Wellston* case are:

One C. C. Willmore was engaged in the business of real estate and land development. He owned all the stock of the Cyrus Crane Willmore Organization, Incorporated. The company was organized to conduct a general real estate business, including acquirement, holding, improvement and disposition of real estate, and to execute, acquire, hold and dispose of notes, mortgages and bonds. This company was the agency through which Willmore operated.

In order to acquire, improve and dispose of certain real estate he caused a new corporation, Wellston Hills Realty Company, to be formed, the old company owning all the stock of the new. The Realty Company acquired the land. Two days later the Wellston Hills Syndicate Fund was established by an agreement between the Realty Company and "the subscribers hereto collectively."

The agreement provided that the company had purchased the land and needed financial aid to pay for it and to improve and develop it and properly market it, and the Syndicate Subscribers have agreed to furnish the financial aid. The company was to be the "Syndicate Manager." The Syndicate was to furnish $95,000 and the company $5,000, which $100,000 was to be used to pay for said land, to pay interest on money borrowed, to pay engineers' fees and for the improvement and development of the land. The Syndicate Subscribers were not to be regarded as partners of each other or of the company. The funds advanced by the Syndicate were not to be regarded as a loan but were to finance the project.

Amounts received from the sales were to be deposited to the credit of the Syndicate and paid out (1) 25% to the company, (2) 6% per annum to Subscribers, (3) to fully pay for the land and improvements, etc., (4) such amounts to the Syndicate Subscribers as the company determines are available for distribution, and (5) after payment of all debts, etc., and upon dissolution, to the Syndicate Subscribers.

The Syndicate Subscribers could be held liable for loss only up to their subscription payments and recourse could not be had against them for losses in excess of the original subscriptions. The separate interests of subscribers were transferable by endorsement and certificates were issued.

The Court held the purpose, as set forth in the agreement, was to make money through the acquisition, improvement and sale of real property.

The Court then looked into whether the agreement revealed sufficient similarity to a corporation. It held "There was centralization of control, in that the Realty Company—the 'Syndicate Manager'—had sole control of the Fund under the provisions and limitations set forth in the contract. There was a continuity of interests and an express disavowal of a partnership relation. There was an express limitation of liability to the amount of the respective subscriptions. There was express power of transferability of individual interests."

In the *Wellston* case we find an individual who was engaged in the real estate business who, in order to *finance a portion of his business,* elicited such financing by a plan whereby he formed a corporation. Not wanting to sell stock in his corporation, he sold subscriptions in his plan called a Syndicate. Unlike the case at bar, where the individuals wishing to dispose of land already owned, the Wellston plan was conceived to acquire the land, to take over a portion of Willmore's business. He gave the subscribers, as shown by the agreement and pointed out by the Court, all the safeguards and management of his corporation,—limited liability, transferable certificates and his corporate management and control.

We submit that the *Wellston* case, albeit defendant's most parallel case in the Court below, is not one whit analogous to the instant case—*but is a tacit admission by the Government that plaintiff is not* an association taxable as a corporation.

The last remaining case cited by and relied on by the Government is *Security-First National Bank v. Commissioner,* 148 F. (2d) 937, of which the Government contended below and states on page 27 of its brief in this Court "is indistinguishable in principle and it is determinative of the issues here."

In this case sixty-two persons created a trust to acquire certain prospective oil land and authorized the trustee to lease it for oil or for other than oil or minerals, to sell or convey it. The trustee was authorized to accept the

royalty from oil and gas lease "in cash or kind." The trust provided for a committee of five beneficiaries to direct the trustee with respect to such leases. Transferable certificates were provided for and issued and certificates were transferred.

The Court, in applying the "business purpose" test to this trust, said:

> "The character of the organization as to whether or not it is a 'business trust' is determined by what the instruments creating the trust empowered the trustee to perform, . . ."

and then says:

> "Here the trustee was empowered to receive the royalties from the oil and gas leases in kind. This would require it to conduct the business of selling the oil or gas to obtain the cash to be distributed to the beneficiaries. The trustee was also empowered to engage in the business of 'rent (ing and) leas (ing the trust property) for other than oil or gas purposes' and sell or convey it outright. The organization was thus purposed to engage in business. . . ."

This Court then held the trust had each of the five salient features of a corporation referred to in the *Morrissey* case, *supra*. We have, above, treated of this Court's holding with respect to the feature of limited liability.

In the *Security-First National Bank* case the Court refers to the trust's power to engage in the oil business and

in the business of renting and leasing the property for other than oil. The rental of the property in the instant trust by the trustee is expressly prohibited. [R. 116.]

How different again from the instant case. There, again, is a case where a trust was formed to acquire property and could enter into the oil business or the rental business, or both, while in the instant case the trust was formed to liquidate the property of the trustors exactly as was the trust in the *A. A. Lewis* case, *supra.*

It is noteworthy that in *each* of the cases involving the question whether a trust is an association, relied on by the Government, the trust was formed to go into the market and *acquire* the property which was the subject of the trust—and hence such trust could not have been a liquidating trust—for one can only liquidate what one has. The Government appears to recognize this and admit it for it uses a capital stock tax *corporation* case, on page 19 of its brief in an attempt to overcome this *vital* difference between the instant case and those relied on by it in its brief. We have, we believe, effectively demonstrated the inapplicability of capital stock tax *corporation* cases wherein the postulate there is the question here.

We submit the instant trust, being purely a loan security and liquidation trust having no business purpose, is controlled by the U. S. Supreme Court's Decision in *A. A. Lewis & Co. v. Commissioner, supra,* and this Court's decision in *Commissioner v. Gerstle, supra,* and is not an association taxable as a corporation.

II.

The Trust Is Not Taxable as a Trust on Its Undistributed Income for the Year 1938.

The Government contends that if the instant trust is not an association, taxable as a corporation, then it was taxable under Section 162, Internal Revenue Code, as a true trust on its undistributed income for the year 1938.

Taxpayer contends that the trust is revocable by the grantors and hence the income is taxable to them under Section 166, Internal Revenue Code.

Sections 162 and 166, Internal Revenue Code, read as follows:

> "Sec. 162. Net Income.
>
> The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that— . . ."
>
> "Sec. 166. Revocable Trusts.
>
> Where *at any time* the power to revest in the grantor title to any part of the corpus of the trust is vested—
>
> (1) in the *grantor, either alone* or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or
>
> (2) . . . (not applicable)
>
> then the *income* of such part of the trust *shall be included in computing the net income of the grantor.*" (Emphasis supplied.)

The grantors and the beneficiaries are the same. [R. 109-110; 114-115.] Paragraph X [R. 121] of the trust gives the beneficairies the *power* to revoke the trust. Hence the grantors reserved the power to revoke the trust.

The power to revoke the trust is vested in the grantors alone. They do not have to act in conjunction with any one whether having an adverse interest or not.

Section 166, I. R. C., is in the *disjunctive*—if the power to revoke the trust is vested in the grantor alone, then the income is taxable to him or if the power to revoke the trust is vested in the grantor and some one else not having such adverse interest, then the income is taxable to the grantor.

The only portion of Section 166(1) which concerns this case is "in the grantor, alone," since the Government concedes on page 35 of its brief that the singular "grantor" includes the plural "grantors".

Section 1 of the Revised Statutes provides that the singular shall include the plural. Said section is incorporated in the Internal Revenue Code by Section 3797.

In *Bromley, Jr. v. Commissioner,* 66 F. (2d) 552, and *Crossett v. United States,* 30 Fed. Supp. 802, it was held that Section 166 applied where there was more than one grantor.

The Government's contention as to the adverse interest of the grantors (Br. 34) or of the beneficiaries (Br. 35) can only mean that the Government is claiming that in

their respective capacities as grantors and beneficiaries they are different persons. *The nicety of that argument as an avenue to tax avoidance* must be clear even to the Government. For example, two individuals in the upper income tax brackets own an encumbered, income producing property as tenants in common, the income from which is includible in their individual income tax returns. They, as grantors, create a trust with such property as the trust corpus and themselves as joint beneficiaries. It is provided that the income may be accumulated. They provide in the trust that they can revoke the trust acting jointly, but only after said encumbrance is paid off or adequately provided for. Under the Government's contention their interests would be adverse since each is "bound to assume his . . . share of the" encumbrance and hence the trust would not be revocable under Section 166 and the income could be accumulated and taxed in lower brackets to the trust.

It is submitted that Congress never intended in its enactment of Section 166 to leave such an obvious loophole for the avoidance of taxes.

The grantors, acting alone, having the power to revoke the trust, the income is taxable to them under Section 166 and not to the trust under Section 162, I. R. C.

Conclusion.

The District Court did not err in concluding that the taxpayer trust is not an association taxable as a corporation within the meaning of Section 901(a)(2) of the Revenue Act of 1938 and Section 3797(a)(3) of the Internal Revenue Code, nor in concluding that the trust was not taxable on its undistributed income for 1938 as an ordinary trust.

The judgment entered by the District Court is correct and should be affirmed.

Dated September 6, 1946.

Respectfully submitted,

Lloyd G. Rainey,
J. Everett Blum,
Counsel for Appellee.

No. 11327

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAUL A. PORTER, Administrator, Office of Price Administration,

Appellant,

vs.

KENNETH W. TROWBRIDGE, doing business as Kenneth W. Trowbridge Co., and Precision Motor Parts,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

FILED
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CLERK

Rotary Colorprint, 661 Howard Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
Northern District of California, Southern Division

No. 23550-S

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

KENNETH W. TROWBRIDGE, d.b.a. KENNETH W. TROWBRIDGE CO., and PRECISION MOTOR PARTS,

Defendant.

COMPLAINT FOR INJUNCTION AND TREBLE DAMAGES

COUNT ONE

1. In the judgment of the Price Administrator, the defendant engaged in actions and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942 (Pub. Law No. 421, 77th Cong., 2d Sess., Ch. 26, 56 Stat. 23), as amended, hereinafter called "the Act", in that defendant violated Maximum Price Regulation No. 452, as amended, effective in accordance with the provisions of the Act, establishing Manufacturer's Maximum Prices for Automotive Parts. [1*]

2. Jurisdiction of this action is conferred upon this Court by Sections 205(c) and 205(e) of the Act.

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* Page numbering appearing at foot of page of original certified Transcript of Record.

3. From and including the second day of September, 1943, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 452, as amended, establishing Manufacturer's Maximum Prices for Automotive Parts.

4. Subsequent to the second day of September, 1943, the defendant, doing business in the City and County of San Francisco, State of California, sold, offered to sell, and continues to sell and offer for sale, as a manufacturer, rebuilt automotive parts at prices in excess of the maximum prices permitted by said Maximum Price Regulation No. 452, as amended.

COUNT TWO

1. The allegations set forth in paragraphs 1, 2, 3, and 4 of Count One herein are incorporated by reference as if fully set forth.

2. None of the said purchases was made for use or consumption other than in the course of trade or business; the defendant, as a manufacturer, has demanded and received a price or consideration for rebuilt automotive parts sold by him, in excess of the maximum prices established therefor by Maximum Price Regulation No. 452, as amended.

3. Three times the aggregate amount by which the prices received by the defendant in the transactions referred to in paragraph 4 of Count One, and as incorporated in paragraph 1 of this Count, and as referred to in paragraph 2 of this Count exceeds the maximum prices provided by Maximum

Price Regulation No. 452, as amended and revised, equals $25,077.00.

Wherefore, the Price Administrator demands:

1. A final injunction enjoining the defendant, his agents, servants, employees and attorneys, and all persons in active concert or participation with them, from: [2]

Directly or indirectly selling, delivering, or offering for sale or delivery, as a manufacturer, any rebuilt automotive parts at prices in excess of those established by Maximum Price Regulation No. 452, as amended or revised, or otherwise violating or attempting or agreeing to do anything in violation of said regulation or in violation of any regulation or order adopted pursuant to the Emergency Price Control Act of 1942, as amended or revised, establishing maximum prices for manufacturers of rebuilt automotive parts.

2. Judgment on behalf of the United States of America against the defendant in the sum of $25,077.00.

3. Such other further and different relief as to the Court may seem just and proper in the premises.

Dated: August 2nd, 1944.

THOMAS C. RYAN,
GEO. A. FARADAY,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 2, 1944. [3]

[Title of District Court and Cause.]

MOTION TO DISMISS, AND FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS

Now comes the above named defendants and move the above-entitled court as follows:

(a) For an order dismissing the above-entitled action because the complaint fails to state a claim upon which relief can be granted.

(b) For a more definite statement of certain matters contained in said complaint, or in the alternative for a bill of particulars, because such matters are not averred with [4] sufficient definiteness or particularity to enable the defendants properly to prepare their responsive pleading, or to prepare for trial.

Paragraph 1 of Count One alleges that defendants violated the Maximum Price Regulation No. 452 as amended, and Paragraph 4 recites that subsequent to September 2, 1943, defendant "sold, offered to sell, and continues to sell and offer for sale, as a manufacturer, rebuilt automotive parts at prices in excess of the maximum prices permitted by said Maximum Price Regulation No. 452, as amended."

Count Two incorporates, among others, Paragraphs 1 and 4 of Count One. Paragraph 2 of Count Two further alleges that the defendant has demanded and received a price or consideration for rebuilt automotive parts sold by him in excess of

the maximum prices established by Maximum Price Regulation No. 452 as amended, and Paragraph 3 further states that three times the aggregate amount by which the prices received by defendant in the transactions referred to in the complaint exceeds the maximum price provided by Maximum Price Regulation 452 as amended and revised equals $25,077.

Defendant desires a more definite statement or in the alternative a bill of particulars as follows:

(1) The dates upon which it is claimed that defendants sold, or offered to sell rebuilt automotive parts at prices in excess of the maximum prices permitted by Maximum Price Regulation 452, as amended.

(2) The maximum authorized prices permitted for the rebuilt automotive parts involved.

(3) The prices at which it is claimed defendant sold rebuilt automotive parts.

(4) How the sum of $25,077 (the amount of the treble [5] damages) is made up.

(5) What kind of rebuilt automotive parts it is claimed defendant sold.

Respectfully submitted,

HAGAR, CROSBY & CROSBY,

Attorneys for Defendants.

GERALD H. HAGAR,
CARLISLE C. CROSBY,
PETER J. CROSBY, JR.,
Of Counsel.

(Here follows memorandum in support of Motion to Dismiss and for More Definite Statement or for Bill of Particulars.)

[Endorsed]: Filed Sept. 21, 1944. [6]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now the above-named defendant, and answering the alleged Count I in plaintiff's complaint contained, admits, denies and alleges as follows:

I.

Alleges that he has no information or belief sufficient to enable him to answer that portion of paragraph 1 of Count I commencing with the first word thereof and ending with the words "the Act," line 27, page 1, of said complaint, and basing his denial upon that ground, denies generally and [7] specifically, each and every, all and singular, the allegations contained in said portion of said paragraph:

Denies generally and specifically, each and every, all and singular, the allegations contained in the remainder of said paragraph.

II.

Admits the allegations in paragraph 2 of said Count I.

III.

Admits the allegations contained in paragraph 3 of said Count I.

IV.

Denies generally and specifically, each and every, all and singular, the allegations contained in paragraph 4 of said Count I.

Wherefore, etc.

Answering the alleged Count II in said complaint contained, this answering defendant admits, denies, and alleges as follows:

I.

The admissions, denials and allegations set forth in paragraphs I, II, III and IV of this answering defendant's answer to Count I in plaintiff's complaint contained are hereby incorporated by reference as if set forth herein in haec verba.

II.

Denies generally and specifically, each and every, all and singular, the allegations contained in paragraph 2 of said Count II.

III.

Denies generally and specifically, each and every, all and singular, the allegations contained in paragraph 3 [8] of said Count II; and further in this

respect, denies that any sales by this defendant exceeded the maximum prices provided by Maximum Price Regulation No. 452 in any sum or amount whatsoever.

Wherefore, this answering defendant prays:

1. That plaintiff take nothing by his complaint on file herein;

2. That this defendant be hence dismissed with his costs;

3. And for such other and further relief as to the Court may seem proper in the premises.

HAGAR, CROSBY & CROSBY,

Attorneys for Defendant.

Of Counsel:

GERALD H. HAGAR,

CARLISLE C. CROSBY,

PETER J. CROSBY, JR. [9]

State of California,
County of Alameda—ss.

Kenneth W. Trowbridge, being duly sworn, deposes and says:

That he is the defendant in the above entitled action; that he has read the foregoing answer to complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to the

matters therein stated on information or belief, and as to those matters he believes it to be true.

KENNETH W. TROWBRIDGE

Subscribed and sworn to before me this 31st day of October, 1944.

[Seal] RUTH W. GLEERUP,
Notary Public in and for the County of Alameda, State of California.

Receipt of a copy of the within Answer to Complaint acknowledged this 1st day of November, 1944.

GEO. A. FARADAY, ff,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 1, 1944. [10]

[Title of District Court and Cause.]

INTERROGATORIES TO BE ANSWERED BY PLAINTIFF UNDER RULE 33, RULES OF CIVIL PROCEDURE AND ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANT

INTERROGATORY NO. 1

State all dates upon which it is alleged these defendants sold rebuilt automotive parts at prices in excess of those established by Maximum Price Regulation No. 452 as amended.

INTERROGATORY NO. 2

State all dates upon which it is alleged these defendants offered to sell rebuilt automotive parts at prices in excess of those established by Maximum Price Regulation 452 as amended

ANSWERS TO INTERROGATORIES NOS. 1 AND 2

The dates upon which defendant sold and offered to sell rebuilt automotive parts and accessories at Prices in excess of those established by Maximum Price Regulation 452, as amended, are from September 1, 1943, to and including May 31, 1944.

INTERROGATORY NO. 3

State the name of each person and his address to whom it is alleged these defendants, or any of them, sold rebuilt automotive parts at prices in excess of the maximum prices permitted by said Maximum Price Regulation 452 as amended, the date of each such sale, the article sold to each such person, the unit and gross price for which each article was sold and the number of articles sold to each such person.

INTERROGATORY NO. 4

State the name of each person and his address to whom it is alleged these defendants, or any of them, offered to sell rebuilt automotive parts at prices in excess of the [11] maximum prices permitted by said Maximum Price Regulation 452 as amended, the date of each such offering, the article offered to each such person, the unit and gross price

for which each article was offered and the number of articles offered for sale to each such person.

INTERROGATORY NO. 5

How was each such offering made, verbal or in writing? If in writing, attach a copy of each such offering.

ANSWERS TO INTERROGATORIES NOS. 3, 4 AND 5

Affiant does not have the knowledge or information necessary to answer defendant's Interrogatories No. 3, No. 4 and No. 5. The name and address of each person defendant sold and offered to sell rebuilt automotive parts and accessories at prices in excess of the maximum price permitted by said Maximum Price Regulation 452, as amended, the date of each such sale, the article sold and offered to be sold to each such person, and the unit and gross prices for which each article was sold and offered for sale, and the number of articles sold and offered for sale to each such person, is more peculiarly within the knowledge of defendant. Whether or not each sale or offer to sell was made verbally or in writing is also more peculiarly within the knowledge of defendant. [12]

The amount by which defendant sold rebuilt automotive parts and accessories at prices in excess of the maximum prices permitted by said Maximum Price Regulation 452, as amended, was determined from defendant's Manufacturer's Excise Tax Re-

turns with the Bureau of Internal Revenue at San Francisco, California, for the months of September, 1943; October, 1943; November, 1943; December, 1943; January 1944; February, 1944; March, 1944; April, 1944, and May, 1944. Defendant Kenneth W. Trowbridge, doing business as Precision Motor Parts, is a manufacturer of rebuilt automotive parts and accessories and as such, subject to the Federal Manufacturer's Excise Tax. Prior to September 1, 1943, defendant, Kenneth W. Trowbridge, doing business as Precision Motor Parts, failed and neglected to pay such tax. Defendant in accordance with specific instructions from the Bureau of Internal Revenue, commenced paying said Manufacturer's Excise Tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943. On September 1, 1943, defendant, doing business as Precision Motor Parts, issued a new price list "6" cancelling price list "5". Said price list set forth [13] prices 5% in excess of previous prices with a reference on the face of the catalog "with Federal Excise Tax included." All sales of rebuilt automotive parts and accessories, from and including the first day of September, 1943, were at a price increase of 5% over prices for sales of rebuilt automotive parts and accessories prior to September 1, 1943. Section 15(a) of Maximum Price Regulation 452, as amended, provides as follows:

> "Any tax levied by any statute of the United States . . . which the manufacturer on March 31, 1942, added to the price paid by the pur-

chaser, shall not be included in the maximum price but may be collected by the manufacturer in addition to the maximum price, if such tax is stated separately from the purchase price * * *"

Defendant, doing business as Precision Motor Parts, did not add a Manufacturer's Excise Tax to his price on March 31, 1942. Under said Section 15(a) of Maximum Price Regulation 452, as amended, defendant may collect a Manufacturer's Excise Tax in addition to the maximum price only if on March 31, 1942, said tax was added to the ceiling price. Defendant does not satisfy the condition allowing a manufacturer to charge the Manufacturer's Excise Tax to his customers inasmuch as he did not add said Manufacturer's Excise Tax to his price on March 31, 1942. Therefore, all of the Manufacturer's Excise Tax collected by defendant from his customers during the aforesaid period of time, that is, from September 1, 1943, to and including May 31, 1944, were in excess of defendant's maximum price. The amounts of the tax collected are set forth in defendant's Excise Tax Returns filed with the Bureau of Internal Revenue during the aforesaid months. The amounts of tax for each month as set forth on defendant's Excise Tax Returns filed with the Bureau of Internal Revenue in San Francisco, California, are as follows: [14]

September, 1943	$ 938.81
October, 1943	1060.38
November, 1943	1025.15

December, 1943	1276.25
January, 1944	1062.99
February, 1944	1000.00
March, 1944	1000.00
April, 1944	935.49
May, 1944	59.93
Total	$8359.00

All of the Manufacturer's Excise Tax paid by defendant, doing business as Precision Motor Parts, during said months were for sales of rebuilt automotive parts and accessories during said months. All of said amounts set forth in said Excise Tax Returns were collected by defendant, doing business as Precision Motor Parts, from defendant's customers in excess of defendant's maximum price under Maximum Price Regulation 452, as amended.

INTERROGATORY NO. 6

What do you claim are the respective maximum prices permitted by Maximum Price Regulation 452, as amended, for each of the rebuilt automotive parts alleged to have been sold by defendants in excess of the maximum prices permitted by said Maximum Price Regulation 452, as amended?

ANSWER TO INTERROGATORY NO. 6

Defendant's maximum prices permitted by Maximum Price Regulation 452, as amended, for each of the rebuilt automotive parts sold between September 1, 1943, to and including May 31, 1944,

are the prices charged by defendant to his customers during said period of time less 5% Federal Excise Tax included in price list "6" cancelling price list "5".

INTERROGATORY NO. 7

Did you, prior to the filing of the complaint against these defendants, advise any of said defendants of your claim that defendants had charged prices in excess of the maximum prices permitted by said Maximum Price Regulation 452, as amended?

ANSWER TO INTERROGATORY NO. 7

Affiant does not have any information or knowledge that Kenneth W. Trowbridge, doing business as Precision Motor Parts, was advised or notified prior to the filing of the complaint in the above entitled matter, that said defendant had charged prices in excess of the maximum prices permitted by said Maximum Price Regulation 452, as amended.

INTERROGATORY NO. 8

If the answer to Interrogatory No. 7 is in the affirmative, state by whom, to whom, by what means, oral or written, and if in writing a copy of each such advice.

(NO ANSWER TO INTERROGATORY NO. 8)

(Interrogatories to be answered by Plaintiff under Rule 33 of the Rules of Civil Procedure were

filed Nov. 10, 1944. Answers to Interrogatories Propounded by Defendant were filed Nov. 20, 1945.) [17]

[Title of District Court and Cause.]

INTERROGATORIES TO BE ANSWERED BY DEFENDANT UNDER FEDERAL RULES OF CIVIL PROCEDURE

Now comes the above named plaintiff, and serves and files Interrogatories to be answered by defendant as follows:

INTERROGATORY NO. 1

State whether defendant Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts, added a Federal Manufacturer's Excise Tax to the price paid by purchasers in sales of rebuilt automotive parts and accessories on March 31, 1942. [18]

INTERROGATORY NO. 2

If the answer to Interrogatory No. 1 is in the affirmative, set forth in each case the following information:

(a) Date of sale.

(b) Invoice number.

(c) Description of items sold.

(d) Selling price.

(e) Amount of Federal Manufacturer's Excise Tax paid by purchaser.

(f) Whether or not said tax was stated separately from the purchase price on the invoice.

INTERROGATORY NO. 3

If the answer to Interrogatory No. 1 is in the negative, state the first date on which a Federal Manufacturer's Excise Tax was added by Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts, to the price paid by the purchaser.

INTERROGATORY NO. 4

State the first date on which a Federal Manufacturer's Excise Tax was paid by Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts, to the Bureau of Internal Revenue.

INTERROGATORY NO. 5

State the amount of Federal Manufacturer's Excise Tax paid by Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts, to the Bureau of Internal Revenue for each month commencing on the first day of the first month said Federal Manufacturer's Excise Tax was paid by said Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts. [19]

INTERROGATORY NO. 6

State whether the amounts of Federal Manufacturer's Excise Tax set forth in your answer to In-

terrogatory No. 5 was added on to the prices paid by the customers of Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts, commencing September 1, 1943.

INTERROGATORY NO. 7

State whether any Federal Manufacturer's Excise Tax was added on to the price charged by Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts to his customers prior to September 1, 1943.

Dated: January 9, 1945.

/s/ GEORGE A. FARRADAY,
/s/ RALPH GOLUB,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 18, 1945. [20]

[Title of District Court and Cause.]

OBJECTIONS TO INTERROGATORIES

Defendants object to the interrogatories proposed by the plaintiff upon the ground that they are proposed in violation of the Fifth Amendment to the Constitution of the United States as construed in Lees v. United States, 150 U. S. 476, in that the attempt of the plaintiff to compel the defendants to answer the interrogatories is an attempt to compel each of them to be a witness against himself in a suit for a penalty.

/s/ HAGAR, CROSBY & CROSBY,
/s/ GEO. M. NAUS,
Attorneys for Defendants.

NOTICE

To Messrs. George A. Faraday and Ralph Golub, Attorneys for Plaintiff:

Please take notice that the undersigned will bring the above objections on for hearing before the above-entitled court in the Department thereof assigned to District Judge St. Sure, on Monday, the 22nd day of January, 1945, at 10 a.m., or as soon thereafter as counsel can be heard.

/s/ HAGAR, CROSBY & CROSBY,
/s/ GEO. M. NAUS,
Attorneys for Defendants.

MEMORANDUM

The suit is one for a penalty; Brown v. Cummins Distilleries Corp., 56 F. Supp. 941; Brown v. Glick Bros. Lumber Co., 52 F. Supp. 913; Contra, Bowles v. Berard, 57 F. Supp. 94.

Ordered: That the foregoing Objections may be calendared for hearing on Monday, January 22, 1945, at 10 a.m.

A. F. ST. SURE,
United States District Judge.

Receipt of a copy of the foregoing Objections to Interrogatories, this 19th day of January, 1945, is hereby acknowledged.

RALPH GOLUB,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 22, 1945. [22]

District Court of the United States
Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 6th day of April, in the year of our Lord one thousand nine hundred and forty-five.

Present: the Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

The defendant's objections to plaintiff's proposed interrogatories heretofore having been submitted to the Court for consideration and decision; the same now being fully considered, and the Court having filed its written memorandum opinion and order thereon, it is Ordered, in accordance with said opinion and order, that said objections to interrogatories be and the same are sustained. [23]

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER SUSTAINING DEFENDANT'S OBJECTIONS TO INTERROGATORIES

Plaintiff has proposed written interrogatories to be answered by defendant under Rule 33 FRCP, in an action for injunction and treble damages for alleged violations of section 4(a) of the Emergency Price Control Act (50 USCA App. §904(a).) De-

fendant objects to the interrogatories on the ground that they are proposed in violation of the Fifth Amendment to the United States Constitution, wherein it is provided that "No person * * * shall be compelled in any criminal case to be a witness against himself * * *." An action for a penalty is considered a "criminal case" within the purview of this clause. Boyd v. U. S., 116 U. S. 616; [24] Lees v. U. S., 150 U. S. 476. The question for decision is whether an action for treble damages brought by the Administrator of the Office of Price Administration under section 205(e) of the Act (50 USCA App. §925(e)), is one for a penalty

The District Court decisions upon this question are in conflict, and the question was left open by the Circuit Court of Appeals of this Circuit in Glick Bros. Lumber Co. v. Bowles, No. 10,664, decided January 4, 1945. In that case the Office of Price Administration had examined certain documents belonging to defendants before suing for an injunction and treble damages. The District Court held that the action was one for a penalty, and that defendants were entitled to a dismissal based on their immunity against self-incrimination. The Circuit Court of Appeals reversed the District Court, on the ground that the documents produced for inspection were quasi-public in nature, and that to require the production of such documents would not violate defendants' rights under the Fourth or Fifth Amendment. The Court said, "This is true whether the action be regarded as remedial or penal."

The present situation does not involve the production of documents, but is a direct attempt to compel defendant to testify.

In Huntington v. Attrill, 142 U. S. 657, 673, 683, the Supreme Court said that the test of whether a statute is remedial or penal "depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. * * * The test is [25] not what name the statute is called by the legislature or the courts of the state in which is was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person."

Section 925 of 50 USCA App. is entitled "Enforcement," and provides for fine and imprisonment, suspension of licenses, injunctions, and treble damages, for violations of the Act. Section 925(e), relating to suits for treble damages, limits suits thereunder by private individuals to the ultimate consumer or tenant, each of whom is designated in the Act as the "buyer." Actions for treble damages may not be brought by one who purchases in the course of trade or business, and the Administrator is empowered in such cases to sue on behalf of the United States. The damages for which he sues are usually based upon an accumulation of sales to a number of customers, and are many times greater than the amount of damages the buyer may ordi-

narily claim. As originally enacted, the statute permitted the buyer to sue within a year of the violation. By amendment of June 30, 1944, the limitation of the buyer's action has been reduced to thirty days after the violation, and at the end of that time the Administrator may sue in the buyer's stead on behalf of the United States, and such suit by the Administrator operates as a bar to any subsequent action by the buyer for damages for the same violation. No notice to the buyer of the Administrator's intention to sue is required by statute, and he may presumably lose his right of action without being aware that such right existed. The relatively [26] short period within which the buyer may exercise his right to damages under this provision indicates that the true purpose of the section is to add in the enforcement of the Act by providing an additional means of punishing offenders, and is not primarily to provide a remedy to private parties who are injured by violations of the Act. This purpose is also shown by the further amendment of section 205(e) which provides that damages shall be only the amount of the overcharge if defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Treble damages are assessed, therefore, to punish willfulness or carelessness, rather than to remedy the wrong caused to an individual or sovereign, for the injury would be the same whether the violation were voluntary or involuntary.

In Bowles v. Berard, 57 F. Supp. 94, the District

Court of Wisconsin held that both the buyer's and the administrator's actions are remedial suits of a civil nature; that when the Administrator sues on behalf of the United States he represents the public at large, who would be damaged by inflation; and also enables the Government to recoup for damages suffered due to resultant price increases in wartime commodities which it purchases. With regard to the first argument, it may be said that in the prosecution of any public offense the Government sues on behalf of the public at large. Almost any crime or offense which involves money or property affects the national economy, and both the public and the Government in its sovereign capacity benefit directly or indirectly from the punishment of the offender. So far as recoupment by the Government of its own damages caused by inflation is [27] concerned, unless it purchases goods in excess of ceiling prices from the offender himself, I think the violation of the act by an individual has too remote an effect on the price of commodities purchased by the Government to be considered a basis for civil damages.

In Brown v. Cummins Distilleries, 56 F. Supp. 941, the District Court of Kentucky held that an action by the Administrator under section 205(e) is one for a penalty. The Court said, "It (a penalty) is essentially different from the idea of damages which is compensation to an injured party for the injury which he has suffered. In a proceeding of this nature the plaintiff has suffered no damages, and the action is not for the purpose of compen-

sation. Regardless of the language in the statutory provision, it is the nature of the provision itself that is controlling. The action is essentially one for the recovery of a penalty."

In Miller v. Municipal Court, 22 C. (2d) 819, the Supreme Court of California held that section 205(e) is a penal provision with respect to suits brought by the buyer as well as by the Administrator.

In Bowles v. Nasif, 58 F. Supp. 644, an action by the Administrator for treble damages, the question of whether section 205(e) is remedial or penal is not directly presented, but the court remarks that "This statute, 50 USCA Appendix, §901 et seq., is highly penal in its nature * * *."

An action for treble damages would not be a bar to a later criminal suit by the United States against the defendant. It cannot be questioned that the defendant in such criminal action would have the privilege of refusing [28] to testify. Yet if the privilege does not extend to the present action, incriminating testimony might be elicited from defendant here which would enable his conviction in a criminal case. If this be so, the protection guaranteed by the Fifth Amendment would be an empty shell. In U. S. v. Goodner, 35 F. Supp. 286, the court said, "This provision (against self-incrimination), long regarded as one of the safeguards of civil liberty, should be, and according to the authorities must be, applied in a broad spirit to secure to the citizen immunity from self-accusation,

and applies to all proceedings wherein the defendant is acting as a witness in any investigation that requires him to give testimony that might tend to show him guilty of a crime * * *."

I conclude that the present action is one for a penalty within the rule set forth in Huntington v. Attrill, supra. It is therefore

Ordered:

Defendant's objections to plaintiff's proposed interrogatories are sustained.

Dated: April 6, 1945.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed April 6, 1945. [29]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the above-named parties that:

1. On March 31, 1942, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts. On said date, the Federal Manufacturers' Excise Tax was not added by defendant to the price paid by the purchasers of said rebuilt automotive parts; nor was said tax then considered or included by defendant in his calculation of producing costs as a basis of arriving at his ceiling prices.

2. Subsequent to the 2nd day of September, 1943, and prior to the filing of the Complaint in the above-entitled action on the 2nd day of August, 1944, the defendant, doing business in the City and County of San Francisco, State of [30] California, sold and offered to sell, as a manufacturer, rebuilt automotive parts at ceiling prices, and, in addition, defendant collected, from the purchasers thereof, sums totalling $8359.00 to cover the Federal Manufacturers' Excise Tax. None of said sales were made for use or consumption other than in the course of the trade or business of the purchasers.

3. This stipulation does not preclude either party from offering, at the time and place of trial of said action, any evidence not in conflict with the facts hereinbefore set forth.

Dated at San Francisco, California, this 21st day of November, 1945.

W. H. BRUNNER and
RICHARD COBLENTZ,
By RICHARD COBLENTZ,
Attorneys for Plaintiff.
HAGAR, CROSBY & CROSBY,
By GEO. M. NAUS,
Attorneys for Defendant.

[Endorsed]: Filed Nov. 21, 1945. [31]

[Title of District Court and Cause.]

TRIAL MEMORANDUM FOR DEFENDANT

The action is instituted by the Administrator under the Emergency Price Control Act of 1942

(56 Stat. 23; 50 USC §§901-946), which in §205(e), 50 USC 925(e), authorizes him to bring an action "on behalf of the United States" against "any person selling a commodity" who "violates a regulation, order, or price schedule prescribing a maximum price or maximum prices". By the original Act of 1942, §205(e), the action is "for treble the amount by which the consideration exceeded the applicable maximum price"; by the amendment in 1944 the language was changed to "such amount not more than three times the amount of the overcharge, or the overcharges, [32] upon which the action is based as the court in its discretion may determine," with a proviso, "Provided, however, that such amount shall be the amount of the overcharge or overcharges * * * if the defendant proves that the violation of the regulation, order or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation." The amendment added: "and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price."

The gravamen of the complaint is that "subsequent to" September 2, 1943, "the defendant * * * sold * * *, as a manufacturer, rebuilt automotive parts at prices" (Count One, par. 4), "a price or consideration" (Count Two, par. 2), "in excess of the maximum prices permited by * * * Maximum Price Regulation No. 452, as amended" (Manufacturer's Maximum Prices for Automotive Parts); and that "three times the aggregate amount" of

that excess "equals $25,077.00" (Count Two, par. 3). That amount is a trebling of $8,359.00.

In his Answers to Interrogatories the plaintiff explains that from and including September, 1943, to and including May, 1944, the defendant filed with the Bureau of Internal Revenue monthly returns of Manufacturer's Excise Tax aggregating that amount of $8,359.00, and made payment of the tax. The plaintiff says further in his Answers to Interrogatories that that is an excise tax of 5%, and the collection of it by defendant from his customers resulted in collecting a price "in excess of defendant's maximum price under Maximum Price Regulation 452, as amended."

MPR 452, "Manufacturer's Maximum Price for Automotive Parts" was originally issued August 19, 1943, effective September 2, 1943. It "covers all new and rebuilt automotive parts," §1(c), as to which it superseded the General Maximum Price Regulation, §2. It stated, §3, that "on and after September 2, 1943 * * * (a) No manufacturer shall sell or deliver a part at a price higher than the [33] maximum price permitted by this regulation." It "divides sales into two kinds," §5, (a) Sales of parts at list prices, and (b) Sales of parts at non-list prices, and as to the former said:

"(a) Sales of parts at list prices. 'List price' as used in this regulation means the price for a manufacturer's sale of a part which may be derived from a price list or price sheet published and generally distributed to the trade by him. When a

list price is named in this regulation as the maximum price to a purchaser, it means the price adjusted for all applicable extra charges, discounts or allowances for sales to a purchaser of the same class."

By §6 maximum prices were set at the list price in effect on March 31, 1942, for those manufacturers, such as defendant, who had a price list in effect on March 31, 1942;[1] i.e., the technique of price control adopted as to automobile parts was the base period technique.[2] Under the heading, "Miscellaneous," §15 provided:

"Sec. 15. Federal and State taxes. (a) Any

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[1]Subsequently, by Amendment 4, released March 25, 1944, effective March 30, 1944, there was initiated, through addition of new §8a, "a new method for pricing rebuilt automotive parts, other than rebuilt motors." The present litigation embraces the period antedating that new method.

[2]These techniques fall into three general categories:

1. The base period technique provides that the maximum prices on the commodities in question are those charged or asked for in some previous period. * * *

2. The cost-plus pricing technique establishes maximum prices on the basis of current or other cost to the seller, plus some specified margin or mark-up. * * *

3. The specified 'dollars-and-cents' pricing technique establishes a uniform maximum price for all sellers of a particular commodity, or for all sellers in a given category, or for all sellers in a given area. * * * Office of Price Administration, Fourth Quarterly Report, for the period ended January 31, 1943, pp. 33-34.

tax levied by any statute of the United States or statute or ordinance of any state or subdivision thereof which the manufacturer on March 31, 1942, added to the price paid by the purchaser shall not be included in the maximum price if such tax is stated separately from the purchase price, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part.

(b) Any tax upon the sale or delivery of a part and any compensating use tax upon a part levied by any statute of the United States or statute or ordinance of any state or subdivision thereof and becoming effective on or after March 31, 1942, may also be collected by the manufacturer making such taxable sale or delivery in addition to the maximum price if such tax is stated separately from the purchase price, unless the manufacturer had increased his price on or before March 31, 1942, to reflect such new or increased tax, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part. * * *"

The plaintiff's Answers to Interrogatories disclose that he bases his action upon §15(a) of MPR 452, but the action must fail for any of four reasons:

1. Plaintiff expressly admits in his Answers to Interrogatories that defendant "did not add a Manufacturer's Excise Tax to his price on March 31, 1942." §15(a) is inapplicable as a basis of the action, because it relates only to "any tax * * * which the manufacturer on March 31, 1942, added to the price." It is clear from the Answers to In-

terrogatories that the Bureau of Internal Revenue never collected the excise tax from defendant prior to September 1, 1943, at which time "defendant in accordance with specific instructions from the Bureau of Internal Revenue commenced paying said Manufacturer's Excise Tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943." Therefore, since §15(a) of MPR 452 is inapplicable, and no other basis of liability is stated or shown, the action must necessarily fail.

2. It is clear that there is a casus omissus in §15 of MPR 452, which "is not unusual, particularly in legislation introducing a new system," U. S. v. Weitzel, 246 U. S. 533, 543. "A casus omissus does not justify judicial legislation," Ebert v. Poston, 266 U. S. 546, 554. Subsection (b) of §15 of MPR 452 covers excises levied under any statute "becoming effective on or after March 31, 1942," and therefore does not touch the case at bar. Subsection (a) of §15 extends to a tax or excise levied before March 31, 1942, but only if the manufacturer added it to his price on March 31, 1942. It is clear that §15 of MPR does not reach (i.e., there is a casus omissus in) the case of an excise or tax levied before March 31, 1942, but which tax or excise, because of dispute or controversy about it or for any other reason, was not collected or paid and was not added by a manufacturer to his price nor collected from his customers. The very tax or excise at bar has had a stormy history of controversy and litigation. It was levied by §606 of the Revenue Act of 1932, and in an amended form was codi-

fied in 1939 in the Internal Revenue Code, §3403, the relevant portions of which as amended by the Revenue Act of 1941, §544(b), read:

"§3403. There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

(a) [Covers automobile truck bodies, chassis, trailers].

(b) [Covers other automobile chassis and bodies, and motorcycles].

(c) Parts or accessories * * * for any of the articles enumerated in subsection (a) or (b), 5 per centum."

The complaint alleges that we "sold * * * as a manufacturer, rebuilt automotive parts" (Count 1, par. 4; Count 2, par. 2). Shortly after the imposition of the tax by the Act of 1932 the question arose whether one who rebuilt or repaired was a "manufacturer" subject to the tax. In Skinner v. U. S., (1934) 8 F. Supp. 999 (retreading tires), the opinion at page 1003 quotes opinion-letters of the Commissioner of Internal Revenue at different dates in 1932 ruling that "the process of retreading tires by vulcanization is held to be a repair rather than a manufacturing process." In February, 1933, the Commissioner reversed the ruling. The Court reversed the latter ruling of the Commissioner, saying (8 F. Supp. at 1003, col. 2):

"The court is of the opinion that section 602 of the Revenue Act of 1932 was meant to apply only to newly manufactured tires and that it does not

include retreaded tires, such as are involved in the instant case, and that, in holding that it does include such retreaded tires, the Commissioner of Internal Revenue has exceeded the authority [36] granted him under the act, and that such an interpretation is not a proper interpretation of the act." For seven years after the Act of 1932, the court rulings were against the Commissioner's assertion of taxability. One such, Armature Exchange, Inc., v. U. S., (1939) 28 F. Supp. 10 (reconditioning armatures) listed the rulings as follows (28 F. Supp. at 15, col. 1):

"Instances of repairs or restorations of parts of automobiles, some of the type here involved, others of a different type, which have been declared not to amount to 'manufacturing' are: Retreading tires (Skinner Tire & Rubber Co. v. United States, D. C., 1934, 8 F. Supp. 999); rebuilding armatures (Monteith Bros. Co. v. United States, D. C., Ind. 1936, 18 American Federal Tax Reports, 1320); rebabbiting connecting rods (Hempy-Cooper Mfg. Co. v. United States, D. C. Mo., 1937; 19 American Federal Tax Reports, 1313; Bardet v. United States, D. C. Cal. 1938, Prentice-Hall Federal Tax Current Court Decisions for 1938, Par. 5.507); rebuilding generators and armatures (Becker-Florence Electric Co. v. United States, D. C. Mo., 1938, Prentice-Hall Federal Tax Service Current Court Decisions for 1939, Par. 5.161."

Accord, Con-Rod Exchange, Inc., v. Hendricksen, (1939) 28 F. Supp. 924. But in turn, beginning in

December, 1939, there was a series of decisions in Circuit Courts of Appeal ruling in favor of the Commissioner's claim of "manufacture," i.e., taxability: Clawson & Bals, Inc., v. Harrison, 7 Cir., 108 F. 2d 991 (connecting rods); U. S. v. Armature Exchange, 9 Cir. (1941) 116 F. 2d 969 (rewound armatures); U. S. v. Moroloy Bearing Service, 9 Cir., 124 F. 2d 373 (connecting rods); U. S. v. J. Leslie Morris Co., 9 Cir., 124 F. 2d 371; U. S. v. Armature Rewinding Co., 8 Cir., 124 F. 2d 589 (armatures and generators); Hendricksen v. Seward, 9 Cir., 135 F. 2d 986 (res judicata); Monteith Bros. Co. v. U. S., 7 Cir., 142 F. 2d 139. And see Niagara Motors Corp. v. McGowan, 45 F. Supp. 346.

The foregoing history of controvery with the Commissioner of Internal Revenue illuminates the following portion of the Administrator's answer 3 to interrogatories:

"Prior to September 1, 1943, defendant, Kenneth W. Trowbridge, doing business as Precision Motor Parts, failed [37] and neglected to pay such tax. Defendant in accordance with specific instructions from the Bureau of Internal Revenue, commenced paying said Manufacturer's Excise Tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943. On September 1, 1943, defendant, doing business as Precision Motor Parts, issued a new price list '6' cancelling price list '5'. Said price list set forth prices 5% in excess of previous prices with a reference on the face of the catalog 'with Federal Excise Tax included'. All sales of rebuilt automotive parts and accessories,

from and including the first day of September, 1943, were at a price increase of 5% over prices for sales of rebuilt automotive parts and accessories prior to September 1, 1943."

And it equally illuminates the subsequent statement in the course of answer 3, reading:

"Defendant, doing business as Precision Motor Parts, did not add a Manufacturer's Excise Tax to his price on March 31, 1942."

3. A fatal defect in the Administrator's claim is the false premise that the tax in question is a part of the price of goods sold. The tax is something apart from the price; something separate from the price. The Congress has so declared and commanded. In the very Act levying the tax, it is enacted that in "determining the price for which an article is sold * * * there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge," Revenue Act of 1932, §619(a), now I.R.C. §3441(a). That language is carried into the text of Regulations 46 (Excise Taxes) §316.8. In the report (H. R. Report No. 708, 77th Cong., First session) of the Committee on Ways and Means on the Revenue Bill of 1932, under the original section numbering of the Bill, it is said:

"SECTION 604. SALE PRICE.

"Section 604 provides rules for determining the sale price which is the basis of the tax. In general, this should be the manufacturer's or producer's price at the factory or place of production. * * * The amount of tax under this title is to be excluded.

It is not intended to require the tax to be separately charged. If no separate charge is made, the tax is to be presumed to be included. For example, the invoice may specify the charge for the merchandise as $100, plus $2.25 [38] for the manufacturers' tax, or it may simply state the charge as $102.25 for the merchandise and in either case the manufacturers' tax will be $2.25. This has been found in Canada to be the most workable plan and the fairest to industry in general."

Therefore, whether or not a manufacturer states the price separately from the tax, the tax is not a part of the price. "If no separate charge is made, the tax is presumed to be included," but that is only a presumption; and the presumption disappears (Ariasi v. Orient Ins. Co., 9 Cir., 50 F. 2d 548) in the face of plaintiff's answer to interrogatories, that "defendant * * * did not add a Manufacturer's Excise Tax to his price on March 31, 1942." In short, the plaintiff Administrator's claim comes down to this: Before September, 1943, defendant did not collect or pay the tax, and he did not add it to his price. By his new price list 6 of September 1, 1943, defendant did not increase his price, but for the first time began to add the tax and collect it from his customers and in turn pay it monthly to the Collector of Internal Revenue. So the Administrator in his answers to interrogatories adds up the taxes collected by defendant from his customers and paid to the Collector month by month, as follows:

"September, 1943	$ 938.81
October, 1943	1060.38
November, 1943	1025.15
December, 1943	1276.25
January, 1944	1062.99
February, 1944	1000.00
March, 1944	1000.00
April, 1944	935.49
May, 1944	59.93
Total	$8359.00",

and then having finished his tax arithmetic by that adding, turns to multiplying by trebling, and then sues for a price overcharge upon sales at prices that were never increased or overcharged, and seeks to have us pay three times more a tax already paid once. A simple analysis and simple statement of his claim should be enough to turn him out of court.

Even though we did not have the Administrator's answer to [39] interrogatories, that "defendant * * * did not add a * * * tax to his price on March 31, 1942," there would be present only the simple question of fact whether we did or did not add it, and it could be easily proved that we did not. In Con-Rod Exchange, Inc., v. Hendricksen, 28 F. Supp. 924, 927, col. 1, it is said:

"The evidence shows that the sales of rebabbitted rods were made at prices fixed by larger competitors who published, regularly, price lists. This was

maintained at all times. Even after the audits made by the agents of the Internal Revenue Department and which resulted in the additional assessment, no change was made to include the additional taxes that might be assessed against them. An executive officer of the plaintiff testified positively that at no time was the price fixed by himself or anyone connected with the company so as to include the tax.

Some of the price lists which the plaintiff sought to meet show that the particular competitor had included the excise tax in the price. There is no showing that plaintiff was aware of that fact. But even if there were, it could not be held to outweigh the positive statements that a possible excise tax was not in contemplation when the price was fixed.

Two merchants may sell the same article at the same price, and yet entirely different elements might enter into the determination of the price. A large dealer, engaged in rebabbitting on a national scale, with a large factory doing the repairing, would have a lower cost, enabling him to absorb the excise tax and still compete with a smaller dealer, like the plaintiff, whose cost of production must be higher and who does not absorb the tax. So the argument from identity of price is of little help."

4. The plaintiff Price Administrator has no jurisdiction over taxes or excises. His jurisdiction is over prices, which is a wholly different subject matter. The grant of jurisdiction to him is in the opening sentence of §2(a) of the Emergency Price Control Act of 1942 (50 USC §902(a)), and reads:

"Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

Most wisely, the Congress reserved to itself the sole jurisdiction over taxes and excises. [40]

The statutory authority to sue given under the Price Control Act, §205(e) (50 USC §925(e)), is addressed to an overcharge in price, not to the addition or collection of a tax. The present suit is outside the authority given by the Congress.

[Endorsed]: Filed Dec. 5, 1945. [41]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

Ordered:

The above-entitled action is dismissed, with costs to defendant.

Defendant may submit findings of fact and conclusions of law in accordance with this order.

Dated: December 10, 1945.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed December 10, 1945. [42]

In the District Court of the United States, Northern District of California, Southern Division.

No. 23550-S

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

KENNETH W. TROWBRIDGE, d.b.a. Kenneth W. Trowbridge Co. and Precision Motor Parts,

Defendant.

FINDINGS AND JUDGMENT

The Court finds:

1. The Court judicially knows, and therefore finds to be true, the allegations of the first three numbered paragraphs of plaintiff's complaint, with respect to the identity and existence of the statutory and regulatory provisions that confer jurisdiction upon this Court over the subject matter of this suit; but the Court finds to be untrue the allegations inserted in those jurisdictional paragraphs that the defendant violated those statutory and regulatory provisions.

2. On March 31, 1942, the defendant, doing business in the City and County of San Francisco, State of California, [43] sold and offered to sell, as a manufacturer, rebuilt automotive parts. On said date, the Federal Manufacturers' Excise Tax was not added by defendant to the price paid by

the purchasers of said rebuilt automotive parts; nor was said tax then considered or included by defendant in his calculation of producing costs as a basis of arriving at his ceiling prices.

3. Subsequent to the 2nd day of September, 1943, and prior to the filing of the Complaint in the above-entitled action on the 2nd day of August, 1944, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts at ceiling prices, and, in addition, defendant collected, from the purchasers thereof, sums totalling $8359.00 to cover the Federal Manufacturers' Excise Tax. None of said sales were made for use or consumption other than in the course of the trade or business of the purchasers.

4. The said tax was levied by section 606 of the Revenue Act of 1932, and in an amended form was codified in 1939 in section 3403(c) of the Internal Revenue Code, but prior to September 1, 1943, the Collector of Internal Revenue made no attempt to collect the said tax from, and it was not paid by, the defendant. On or shortly before September 1, 1943, the Bureau of Internal Revenue specifically instructed the defendant to commence paying said tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943, which the defendant did in the aggregate of $8359.00 mentioned in paragraph 3 hereinabove; and the amount of $25,077.00 mentioned in the second count

of plaintiff's complaint is merely a trebling of said tax aggregate of $8359.00. [44]

CONCLUSIONS AND JUDGMENT

1. The Court concludes and adjudges that the plaintiff should take nothing and that the plaintiff's complaint be dismissed, with costs to defendant.

2. The clerk of this court is directed forthwith to enter the judgment by notation thereof in the civil docket pursuant to Rules 58 and 79(a), FRCP.

Dated: January 2, 1946.

A. F. ST. SURE,
United States District Judge.

Receipt of a copy of the foregoing proposed Findings, Conclusions and Judgment is hereby acknowledged, this 17th day of December, 1945.

W. H. BRUNNER,
ROBERT LONGENECKER,
Attorneys for Plaintiff.

[Endorsed]: Filed January 2, 1946. [45]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that Plaintiff Chester Bowles, Administrator, Office of Price Administration, hereby appeals to the Circuit Court of Ap-

peals for the Ninth Circuit, from the Final Judgment entered in this action on January 2, 1946.

/s/ W. H. BRUNNER,
/s/ RALPH GOLUB,
Attorneys for Plaintiff.

[Endorsed]: Filed February 27, 1946. [46]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

It is hereby designated by the appellant that the following portions of the record, proceeding and evidence be contained in the Record on Appeal:

1. Complaint
2. Answer
3. Stipulation
4. Findings of Fact and Conclusions of Law and Judgment
5. Order for Judgment
6. Interrogatories
7. Answer to Interrogatories
8. Memorandum Opinion and Order
9. Objections to Interrogatories
10. Motion to Dismiss
11. Transcript of proceedings on trial [47]

12. Notice of Appeal

13. This designation of contents of record on appeal.

/s/ W. H. BRUNNER,
/s/ RALPH GOLUB,
Attorneys for the Plaintiff.

[Endorsed]: Filed February 27, 1946. [48]

[Title of District Court and Cause.]

COUNTER-DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD ON APPEAL

Pursuant to Rule 75(a) FRCP, the defendant designates the following additional portions of the record, proceedings, and evidence, to be included:

1. The page or pages of the clerk's docket relating to this case.

2. Trial memorandum for defendant.

/s/ GEO. M. NAUS.
/s/ HAGAR, CROSBY & CROSBY,
Attorneys for Defendant.

Receipt of a copy of the foregoing Counter-Designation is hereby acknowledged, this 5th day of March, 1946.

RALPH GOLUB, Aty.,
Attorneys for Plaintiff.

[Endorsed]: Filed March 5, 1946. [49]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including May 18, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: April 8, 1946.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed April 8, 1946. [50]

DOCKET ENTRIES

1944

Aug. 2	Filed complt iss summons
Aug. 8	Filed summons ret. ex. 8-3-44
Aug. 22	Filed stip. ex. time of deft to plead to Sept 6
Sept. 21	Filed mos to dis etc. Mailed no.
Oct. 9	Ord deft's mo for more def state etc Denied & deft have 10 days to ans
Nov. 1	Filed ans Mailed no
Nov. 10	Filed interrogs to be answered by pltff
Nov. 13	Ord set for trial Jan 25, 1945

1945

Jan. 8	Ord con Mar 15 for trial
Jan. 18	Filed Interrogatories to be answered by deft under F.R.C.P.

1945	
Jan. 22	Filed deft's objections to Interrogatories Objections to Interrog. sub. briefs 10-10-10
Jan. 24	Filed Brief—objections to Interrogatories
Feb. 3	Filed brief of Plain
Feb. 7	Filed Reply Memo of defts
Feb. 8	Or. objections to interrog. submitted
Mar. 5	Filed praecipe iss subpoena
Mar. 7	Filed subpoena ret ex-V. B. Guerra
Mar. 15	Ord con May 22 for trial
Apr. 6	Ord defts objctns to proposed interrogs sustained Mailed copies of order Filed memo opinion
May 28	Or. trial con't to August 16, 1945
Aug. 16	Or. con'd to Oct 2, pretrial Conf
Oct. 2	Pre-Trial Conf., cont Nov 20 for trial
Nov. 20	Ord con Dec 4 for trial Filed ans to interrogos propounded by deft
Nov. 21	Filed stip re adding Mfgs excise tax
Dec. 4	Ord con Dec 5 for trial
Dec. 5	Trial before the Ct sitting without a jury, submitted Filed deft's trial memo
Dec. 10	Ord case dismissed with costs to deft on findgs to be filed Mailed no Filed ord for judgt [51]
Dec. 17	Lodged findgs

1946

Jan. 2 Filed findg. Judgt; "that the plaintiff should take nothing and that the plaintiff's complaint be dismissed with costs to defendant."

Feb. 27 Filed mo of appeal Mailed mo
Filed designation
Filed aff't of ser

Mar. 5 Filed counter designation

Apr. 8 Filed ord ex time docket appeal

[Endorsed]: Filed April 8, 1946. [52]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 52 pages, numbered from 1 to 52, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Chester Bowles, etc., Plaintiff, vs. Kenneth W. Trowbridge, etc., Defendant, No. 23550-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $14.80, and that the said amount

has been charged against the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 15th day of May, A. D. 1946.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ E. VAN BUREN,
Deputy Clerk. [53]

[Endorsed]: No. 11327. United States Circuit Court of Appeals for the Ninth Circuit. Paul A. Porter, Administrator, Office of Price Administration, Appellant, vs. Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co., and Precision Motor Parts, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed: May 17, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States in and for the Ninth Circuit

No. 11,327

PAUL A. PORTER, Administrator, Office of Price Administration,

Appellant,

vs.

KENNETH W. TROWBRIDGE, d.b.a. Kenneth W. Trowbridge Co., and Precision Motor Parts,

Appellee.

STATEMENT OF POINTS

On the appeal taken in the above-entitled action, the appellant, Paul A. Porter, Administrator of the Office of Price Administration, will urge and rely upon the following points:

1. The Court erred in sustaining appellee's general objection to all of appellant's interrogatories, whether incriminating or not, upon the ground that to require the appellee to answer the proposed interrogatories would compel the appellee to testify against himself in a criminal case in violation of the fifth amendment to the constitution.

2. The Court erred in concluding as a matter of law that the appellee was entitled under the provisions of Maximum Price Regulation No. 452, as amended, to collect from purchasers of rebuilt automotive parts manufactured and sold by appellee as alleged in the complaint the sum of $8,359.00 to

cover the Federal manufacturers' excise tax in addition to the ceiling prices of the said rebuilt automotive parts.

3. The court erred in concluding and adjudging that the appellant should take nothing and that the appellant's complaint should be dismissed.

4. The Court erred in failing to award injunctive relief and treble damages as demanded in the complaint herein.

/s/ HERBERT H. BENT,

Regional Litigation Attorney.

/s/ W. H. BRUNNER,

District Enforcement Attorney. Attorneys for the Appellant.

[Endorsed]: Filed June 13, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant herein designates the following portions of the record, proceedings, and evidence to be contained in the printed record on appeal herein:

1. Entire record of said cause of action.

2. This designation of contents of record on appeal.

/s/ HERBERT H. BENT,

Regional Litigation Attorney.

/s/ W. H. BRUNNER,

District Enforcement Attorney. Attorneys for the Appellant.

[Endorsed] Filed June 13, 1946. Paul P. O'Brien, Clerk.

No. 11,327

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL A. PORTER, Administrator, Office of Price Administration,
Appellant,

vs.

KENNETH W. TROWBRIDGE, doing business as Kenneth W. Trowbridge Co., and PRECISION MOTOR PARTS,
Appellees.

BRIEF FOR APPELLANT.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement

DAVID LONDON,
Director, Litigation Division

ALBERT M. DREYER,
Chief, Appellate Branch

KARL E. LACHMANN,
Attorney,
Office of Price Administration
Washington 25, D. C.

Attorneys for Appellant.

WILLIAM B. WETHERALL,
Regional Litigation Attorney,
Office of Price Administration
San Francisco 8, California.

FILED

OCT 17 1946

PAUL P. O'BRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 11,327

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL A. PORTER, Administrator, Office of Price Administration, *Appellant,*
vs.
KENNETH W. TROWBRIDGE, doing business as Kenneth W. Trowbridge Co., and PRECISION MOTOR PARTS, *Appellees.*

BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal by the Price Administrator from a final judgment of the United States District Court for the Northern District of California, Southern Division, dismissing an action brought under Section 205 (a) and 205 (e) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S.C. App. Section 925 (a) and (e)), to restrain the defendant from further violating the Act and applicable regulations issued thereunder and to recover from him statutory damages on account of past violations.

The judgment dismissing the action was entered on December 10, 1945. (R. 41.) Notice of appeal was filed February 27, 1946. (R. 44.) Jurisdiction of the District Court was invoked under Section 205 (c) of the Act (50 U.S.C. App. § 925 (c); jurisdiction of this Court is invoked under section 128 of the Judicial Code. (28 U.S.C. § 225.)

STATUTES AND REGULATIONS INVOLVED.

The instant proceeding involves Sections 205 (a) and 205 (e) of the Emergency Price Control Act of 1942 as amended: Sections 5, 6, 9, and 15 of Maximum Price Regulation 452, issued August 19, 1943, and effective September 2, 1943 (8 F.R. 11572); and Sections 3403 and 3441 (a) of the Internal Revenue Code, 26 U.S.C. 3403, 3441 (a). The relevant provisions of each are set forth in the appendix.

STATEMENT OF FACTS.

The complaint charged defendant with having sold rebuilt automotive parts at prices in excess of the maximum prices established by Maximum Price Regulation 452. It prayed for the recovery of statutory damages in the amount of $25,077.00 (being three times the amount, $8359.00, by which the prices at which parts were sold exceeded the legal maximum) and an injunction restraining the defendant from further violating the regulation or any other regula-

tion establishing maximum prices for rebuilt automotive parts. The answer of the defendant denies the material allegations of the complaint.

The plaintiff propounded interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure concerning the sales involved in the action. (R. 17-19.) The defendant objected to the interrogatories upon the ground that plaintiff could not compel the defendant to testify in this proceeding (R. 19) and the Court sustained the objection. (R. 21.)

Thereafter, the parties entered into a stipulation (R. 27-28) which insofar as here material reads as follows:

"STIPULATION

It is hereby stipulated and agreed by and between the above-named parties that:

1. On March 31, 1942, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts. On said date, the Federal Manufacturers' Excise Tax was not added by defendant to the price paid by the purchasers of said rebuilt automotive parts; nor was said tax then considered or included by defendant in his calculation of producing costs as a basis of arriving at his ceiling prices.

2. Subsequent to the 2nd day of September, 1943, and prior to the filing of the Complaint in the above-entitled action on the 2nd day of August, 1944, the defendant, doing business in the City and County of San Francisco, State of

> [30] California, sold and offered to sell, as a manufacturer, rebuilt automotive parts at ceiling prices, and, in addition, defendant collected, from the purchasers thereof, sums totalling $8359.00 to cover the Federal Manufacturers' Excise Tax. None of said sales were made for use or consumption other than in the course of the trade or business of the purchasers."

The Court held that the defendant was entitled to add the tax referred to in the stipulation[1] and granted judgment for the defendant. The only questions presented on this appeal are: first, whether the Court erred in holding that the defendant was entitled to add the tax to the maximum prices established by the regulation; and secondly, whether the Court erred in sustaining the defendant's objection to plaintiff's interrogatories.

SPECIFICATIONS OF ERROR.

1. The Court erred in holding that defendant's addition of the manufacturers excise tax to his base date list prices did not constitute an overcharge in violation of the Regulation.

2. The Court erred in sustaining defendant's objection to plaintiff's interrogatories, on the ground that the instant proceeding constituted a "criminal case", within the meaning of the Fifth Amendment.

---

[1]Namely the tax imposed by Section 606(c) of the Revenue Act of 1933 (26 U.S.C. 3403c).

ARGUMENT.

I.

SECTION 15 OF MAXIMUM PRICE REGULATION 452 DOES NOT PERMIT BASE DATE LIST PRICES TO BE SUBSEQUENTLY INCREASED ON ACCOUNT OF TAXES IN FORCE ON THE BASE DATE.

Under Section 6 of the Regulation, parts for which a seller had established a list price on March 31, 1942, the base date, may not thereafter be sold at a higher price. Section 6 makes provision for the establishment of new list prices, but only with the approval of the Office of Price Administration.

There is no showing in the record that defendant obtained Office of Price Administration approval for his Price List No. 6 of September 1, 1943, which increased all prices by 5% over those contained in Price List No. 5 in effect on the base date.

Defendant, however, seeks to derive authority for his new price list from the provisions of Section 15 of the Regulation. Such attempt must fail. Only Section 15 (a) deals with taxes in effect on the base date.[1] It reads as follows:

> "Sec. 15. *Federal and State taxes.* (a) Any tax levied by any statute of the United States or statute or ordinance of any state or subdivision thereof which the manufacturer on March 31, 1942, added to the price paid by the purchaser shall not be included in the maximum price but

[1]Section 15(b) deals with taxes which have come into effect after the March 31, 1942 base date; it is clearly inapplicable. So are Section 15(c) and (d) which deal with taxes paid on parts purchased for resale, and with the transportation tax, respectively.

> may be collected by the manufacturer in addition to the maximum price, if such tax is stated separately from the purchase price, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part."

Under this provision a tax in effect on the base date may continue to be added to the maximum price, if it was so added on the base date. This arrangement is, of course, a simple application of the general principle of base period price-freezing which governs the Regulation. It follows logically that a tax in effect on the base date which was *not* then added to the price may not subsequently be added thereto. It is irrelevant whether this conclusion is derived from the provision of the Regulation or by holding, as defendant argued in the Court below (R. 35), that his case is a "*casus omissus*". For, a "casus omissus" in a provision, granting an exception from the general rule which sets the maximum price at the base date list price, simply means that the "omitted" situation will not be excepted.

This analysis should suffice to support the interpretation here urged, since it is clearly required by the terms of the Regulation. Defendant's objection to the Regulation as so interpreted, on the ground that it exceeds the Administrator's authority by extending it to the tax field (R. 37-41), is not available in this forum, since it constitutes an attack on the validity of the Regulation which is reserved to proceedings

before the Emergency Court of Appeals. Section 204(d) of the Act.[1]

Since these objections constitute the bulk of defendant's case below, it may be useful to demonstrate why they are, in fact, without substance. The objections may be stated as follows:

1. The manufacturers' excise tax is not a part of the price, and as such is outside the Administrator's regulatory power.

2. Defendant should not suffer from his failure to pay the tax on the base date, since he was justified in so doing.

1. Defendant argued in the Court below that the excise tax may not be considered as part of the price, because Section 3441(a) of the Internal Revenue Code so provides. That provision, however, is solely concerned with the basis on which the 5% tax is to be calculated; clearly if that basis included the tax, the seller would be paying a tax upon a tax. This question is in no way related to the price control system embodied in the Regulation. In fact, Section 15 specifically enumerates the cases in which the tax is, or is not, part of the sales price. Defendant, himself, has treated the excise tax as part of his sales price, by including it in the higher prices in his Sales List No. 6.

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[1]*Lockerty v. Phillips*, 319 U.S. 812; *Yakus v. United States*, 321 U.S. 414; *Rosenzweig v. United States* (C.C.A. 9th), 144 Fed. (2d), cert. den. 323 U.S. 764; *Bowles v. Lighthouse Oysters Inc.* (C.C.A. 9th, 1945), 151 F. (2d) 435, 437.

The fact of the matter is, of course, that the Administrator cannot effectively control prices unless he can control the incidence on the purchaser of all the elements which make up the consideration paid to the seller. There are many price factors, like wages, taxes, duties, freight rates, whose determination is outside the Administrator's scope of authority. Yet to conclude from that fact that the seller may pass these charges on to his customer without regard to applicable price ceilings, would be to make a mockery and an illusion out of price control.

Anything given by the purchaser in consideration of the commodity or service obtained is part of the purchase price controlled by the Administrator. Price control depends on freezing not merely the receipts of the seller, but especially the total outlay of the purchaser. Section 205(e) defines "overcharge" as "the amount by which the consideration exceeds the applicable maximum price." Thus, even if the tax were not to be considered as a part of the price, its addition thereto constitutes an overcharge.

This has been fully recognized whenever the question of passing on taxes or other charges in addition to the maximum price has come before the Courts. In *United States Gypsum Co. v. Brown* (C.C.A., 1943), 137 F. (2d) 360, cert. den. 64 S. Ct. 88 (1943), the Emergency Court ruled that a seller who sells on a delivered basis, must absorb the 3% federal transportation tax, imposed by Section 620 of the Revenue Act of 1942, as part of the transportation cost. In

discussing objections to its holding which were similar to those here raised by defendant, the Court stated:

> "The Emergency Price Control Act and the Price Regulations here involved are concerned with the cost to the purchaser just as much as with the net price received by the seller." (p. 362.)
>
> "There is likewise no merit in complainant's contention that by his order the Administrator was seeking to control business practices in violation of the Act. It is obvious that what he sought to do was to determine the parties by whom the tax was to be borne and to prevent its being passed on to ultimate purchasers." (p. 364.)

In *Galban Lobo Co. v. Henderson* (C.C.A. 1942), 132 F. (2d) 150, cert. den. 63 S. Ct. 530 (1943), the Court ruled that the seller had to decrease its base price, in order to keep its delivered price under the ceiling, in the face of an increase in the freight charges.

Thus control by the Administrator of the incidence of taxes and other charges is necessary to effective price control and has been upheld by the Emergency Court which has jurisdiction to pass on the validity of such provisions.

2. In the Court below, defendant argued at great length that the Court should take into consideration the reason why he failed to add the excise tax on the base date. (R. 33-37.) Section 15, of course, leaves no room for such consideration. Nevertheless it should be pointed out here that defendant had no

justifiable reason for his failure to pay the tax during the period in question.

The manufacturers' excise tax on automotive parts was originally established by Section 900(3) of the Revenue Act of 1918 (40 Stat. 1057, 1122) and remained in effect until 1924. It was revived by Section 606 of the Revenue Act of 1932 (47 Stat. 261), which was amended by Section 544(b) of the Revenue Act of 1941 (55 Stat. 711, 721) and incorporated in the Internal Revenue Code, 26 U.S.C. 3403; it now reads as follows:

> "Sec. 3403. *Tax on automobiles, etc.* There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:
>
> * * * * * * *
>
> "(c) Parts or accessories * * * for any of the articles enumerated in subsections (a) or (b), 5 per centum."

Soon after the revival of the tax in 1932, the question arose whether rebuilders of automotive parts were subject to the tax as manufacturers and producers, or were exempt from it as repairmen. In his Regulation No. 46, issued in 1932, the Commissioner of Internal Revenue inserted the following interpretation of the provision in question.

> "*Liable for Tax.*
>
> * * * * * * *
>
> "Art. 4. *Who is a manufacturer or producer.*

"As used in the Act, the term 'producer' includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by completing or assembling two or more articles."

During the periods here involved Article 4 was amended only once, in the 1940 edition of the Regulation, when it was made to read:

"Section 316.4. *Who is a manufacturer.*

"The term 'manufacturer' includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or from raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles."

Treasury regulations, issued under statutory authority, have the force of law.[1] It is clear under these interpretations that the rebuilding of automotive parts from junk and worn-out parts constitutes production within the meaning of Section 3403(c).[2]

If there was ever any doubt as to this conclusion, it was completely eliminated by the consistent holdings of this Court in such cases as *United States v.*

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[1]*Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1920), and cases there cited: *Security First National Bank of Los Angeles v. Welch* (C.C.A. 9th, 1937), 92 F. (2d) 357, 359, cert. den. 303 U.S. 638; *Pacific Nat. Bank of Seattle v. Commissioner* (C.C.A. 9th, 1937), 91 F. (2d) 103, 105, and cases there cited.

[2]The Commissioner's opinion letters of 1932, referred to in *Skinner v. United States*, 8 F. Supp. 999, 1003, are here irrelevant since they dealt with the retreading of tires only and were moreover reversed in the following year.

Armature Exchange, Inc. (C.C.A. 9th, 1941), 116 F. (2d) 969, cert. den. 309 U. S. 685; *United States v. J. Leslie Morris* (C.C.A. 9th, 1941), 124 F. (2d) 371; *United States v. Moroloy Bearing Service of Oakland, Ltd.* (C.C.A. 9th, 1941), 124 F. (2d) 373.[1] In *Henrickson v. Seward et al.* (C.C.A. 9th, 1943), 135 F. (2d) 986, this Court followed its earlier holding, although the company involved had previously gained a contrary ruling in *Con-Rod Exchange Inc. v. Henrickson* (W. D. Wash. 1939), 28 F. Supp. 924.[2]

Thus, well before the March 31, 1942, base date, the law, at least in this circuit, had become clearly established in support of the interpretation embodied in the Commissioner's regulation, to the effect that producers of rebuilt automotive parts were subject to the tax. If defendant failed to pay it on the base date, he cannot now assert that he was mislead or left in ignorance as to his obligations under the Revenue Act. The most he can say—and this is in effect what his present position amounts to—is that, since he was able on the base date to escape payment of this tax, he should be permitted, now that the Bureau of Internal Revenue has caught up with his tax de-

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[1]To the same effect, see: *United States v. Armature Rewinding Co.* (C.C.A. 8th, 1942), 124 F. (2d) 589; *Clawson and Bals, Inc. v. Harrison* (C.C.A. 7th, 1939), 108 F. (2d) 991; *Klepper v. Carter* (C.C.A. 9th, 1923), 286 Fed. 370.

[2]Although in that case the Commissioner had permitted the unfavorable District Court decision to become final, this Court pointed out that such clear misconstruction of the statute could not become *res judicata* so as to grant petitioner a permanent illegal tax advantage over its competitors. To the same effect see *Monteith Bros. Co. v. United States* (C.C.A. 7th, 1944), 142 F. (2d) 139.

linquency,[1] to continue his avoidance of that tax by passing its full amount on to his customers. Such an argument should not prevail.

A final point should be cleared up. The requirement that defendant absorb the excise tax on its sales after September 1, 1943, does not decrease defendant's net receipts for the parts, as against the prices collected on the base date. This is so, because defendant's obligation to pay the excise tax for its sales prior to September 1, 1943, has in no way abated. Once defendant has paid these back taxes and deducted their amounts from his original receipts, he will find that his net receipts, i.e., his real prices on the base date were the same as those now claimed by the Administrator as his maximum prices. This should demonstrate conclusively that defendant's interpretation of the Regulation would in effect result in an increase of his net price over that in effect on the base date. This is clearly contrary to the provisions and purposes of the Regulation.

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[1]There is nothing in the record to support the District Court's Finding No. 4 that "prior to September 1, 1943, the Collector of Internal Revenue made no attempt to collect the said tax from * * * the defendant". (R. 43.) The fact is rather that the Commissioner did not discover defendant's failure to pay the tax until that time.

II.

THE COURT ERRED IN SUSTAINING DEFENDANT'S OBJECTION TO PLAINTIFF'S INTERROGATORIES ON THE GROUND THAT THE INSTANT PROCEEDING CONSTITUTES A "CRIMINAL CASE" WITHIN THE MEANING OF THE FIFTH AMENDMENT.

The District Court's order sustaining defendant's objection to plaintiff's interrogatories is clearly erroneous. (R. 21.) While the facts sought in the interrogatories were subsequently stipulated to by defendant (R. 27-28), the reasoning on which the Court's order was based is clearly in error and, unless corrected, will constitute a dangerous precedent for future cases.

In its order, the Court below sustained defendant's objection on the ground that the instant proceeding constituted a "criminal case" within the meaning of the Fifth Amendment, in which defendant could not be compelled to testify, since "incriminating testimony might be elicited from defendant here which would enable his conviction in a criminal case." (R. 26.) This ruling is evidently based on a confusion. The scope of the constitutional privilege differs with the proceeding in which it is involved. It permits any person, whether defendant or witness, in any proceeding, whether civil or criminal, judicial or administrative, to refuse to give testimony on any specific question where his answer might tend to incriminate him. In addition to this broad protection, the defendant in a criminal case has the privilege of

refusing to testify altogether.[1] If the present action is a criminal case then the Court committed no error in sustaining defendant's objection to the interrogatories. On the other hand, if it is a civil proceeding the Court clearly erred. Thus, in *Helvering v. Mitchell,* 303 U. S. 391, 402, the Supreme Court said:

> "* * * Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury, or if the prescribed proceeding is in the form of a civil suit, a verdict may be directed against the defendant; there is no burden upon the Government to prove its case beyond a reasonable doubt, and it may appeal from an adverse decision; furthermore, *the defendant has no constitutional right* to be confronted with the witnesses against him, or *to refuse to testify;* and finally, in the civil enforcement of a remedial sanction there can be no double jeopardy."[2]

Whether an action is a civil or criminal case does not depend on the form of the proceedings because,

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[1]VIII *Wigmore on Evidence* (3rd Edition, 1940), § 2252, p. 325. The same rules of evidence which prevail at trial also govern discovery examinations under the Federal Rules: II *Moore's Federal Practice* (1938), § 26.13, p. 2478.

[2]In connection with the statement that a defendant in a case other than a criminal case may not refuse to testify, the court, in footnote 12 (303 U.S. 404) said:

> "We do not construe *Boyd v. United States*, 116 U.S. 616, or *Lees v. United States*, 150 U.S. 476, as holding to the contrary where the sanction involved is remedial, not punitive."

as the Supreme Court pointed out in *Helvering v. Mitchell,* 303 U. S. 391, 402, note 6:

> "Even though Congress may not provide civil procedure for the enforcement of punitive sanctions, nothing in the Constitution prevents the enforcement of distinctly remedial sanctions by a criminal instead of a civil form of proceeding.

On the contrary, whether a case is a civil or a criminal case depends on whether or not the sanction to be enforced is imposed solely for the purpose of punishment on the one hand, or for the purpose of repairing past wrongs or preventing future injuries on the other. If the sanction is intended solely as punishment, the action is criminal. On the other hand, if it is intended to compensate for past wrongs or to protect against future injuries, the sanction is civil and remedial.

If the objection of the sanction is to protect against future injuries it is remedial notwithstanding the fact that the person by whom the sanction may be enforced has suffered no pecuniary injury. *United States ex rel. Marcus v. Hess,* 317 U. S. 537; *Helvering v. Mitchell, supra.* In other words, even a penalty may be a remedial and not a criminal sanction for the purpose of determining whether or not the constitutional rights against double jeopardy and self-incrimination may be invoked.[1] For example, the Supreme

[1] Different tests may be applicable for the purpose of determining whether a liability (1) survives, (2) is probable in bankruptcy, (3) is deductible in computing income taxes, or (4) if created by one state must be enforced by another. In all such cases it becomes important to determine whether or not the liability is compensatory or noncompensatory.

Court has classified as remedial the penalties prescribed by the Contract Labor Law. (*Helvering v. Mitchell,* 303 U. S. 391, 402, note 6.) As Mr. Justice Brandeis said in the case last cited (399):

> "Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted. Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings since the original revenue law of 1789. Act of July 31, 1789, c. 5, § 36, 1 Stat. 29, 47. In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." (Citations omitted.)

In support of this proposition the Supreme Court cited *Chicago, Burlington & Quincy Railway Co. v. United States,* 220 U. S. 559, which was an action to enforce a penalty prescribed by the Safety Appliances Act; *Oceanic Steam Navigation Co. v. Stranahan,* 214 U. S. 320; and *Lloyd Sabaudo Societa v. Elting,* 287 U. S. 329, involving penalties prescribed for bringing diseased aliens or seamen into the United States, as well as numerous other cases involving similar types of penalties.

In *Helvering v. Mitchell, supra,* the Supreme Court laid down three tests for determining whether a sanction is criminal or remedial:

First, whether the sanction is of the type which has been traditionally regarded as remedial;

Second, whether the sanction may be enforced by a civil proceeding. In this connection the Supreme Court said (401):

> "3. In sections 276 and 293, 26 U. S. C. A. §§ 276, 293 and notes, it provides that collection of the 50 per centum addition, like that of the primary tax itself, may be made 'by distraint' as well as 'by a proceeding in court.' If the section provided a criminal sanction, the provision for collection by distraint would make it unconstitutional. [Citations omitted.] That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal, sanction. * * *"

Third, whether in addition to the particular sanction a distinctly criminal sanction is provided.

Applying these tests the sanction imposed by Section 205(e) of the Emergency Price Control Act is distinctly remedial. Its purpose is not to punish but to protect the public against inflation. It is of a type which has been traditionally regarded as remedial—as much so as the penalties prescribed by the Immigration Laws and the Safety Appliances Act. It can only be enforced in a civil action. And in addition to it, Congress by Section 205(b) of the Act has provided a distinctly criminal sanction.

In view of the foregoing, it is clear that the Court erred in sustaining the defendant's objections to plaintiff's interrogatories.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed and the cause remanded with instructions to grant judgment for the plaintiff in the sum prayed for in the complaint.

Dated, San Francisco,
October 16, 1946.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED.

Sec. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction restraining order, or other order shall be granted without bond.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its

discretion may determine: Provided, however, that such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior

to the institution of the action in which such judgment was rendered.

Maximum Price Regulation 452.

Article IV—Miscellaneous.

Sec. 15. Federal and State Taxes, (a) Any tax levied by any statute of the United States or statute or ordinance of any state or subdivision thereof which the manufacturer on March 31, 1942, added to the price paid by the purchaser shall not be included in the maximum price but may be collected by the manufacturer in addition to the maximum price if such tax is stated separately from the purchase price, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part.

(b) Any tax upon the sale or delivery of a part and any compensating use tax upon a part levied by any statute of the United States or statute or ordinance of any state or subdivision thereof and becoming effective on or after March 31, 1942, may also be collected by the manufacturer making such taxable sale or delivery in addition to the maximum price if such tax is stated separately from the purchase price, unless the manufacturer had increased his price on or before March 31, 1942, to reflect such new or increased tax, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part.

(c) (1) Any separately stated tax paid by a manufacturer on a part purchased for resale may be collected by such manufacturer in addition to the maximum price upon the resale of such part unless

the price in effect on March 31, 1942, reflected the amount of such tax.

(2) Any tax paid by a manufacturer upon the purchase of a component of a part which can be delivered separately from the principal assembly of the complete part may also be collected by the manufacturer upon the sale of the part as well as upon the sale of the component separately, if such tax is stated separately from the purchase price, unless the manufacturer's price for the component or the part in effect on March 31, 1942, reflected the amount of such tax.

(d) A tax on transportation of parts imposed by section 620 of the Internal Revenue Act of 1942, for the purpose of determining the applicable maximum price, shall be treated as a cost of transportation. It shall not be treated as a tax for which a charge may be made in addition to the maximum price.

Title 26 United States Code.

§ 3403. Tax on automobiles, etc.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold:

(a) Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semi-trailer chassis, truck and bus trailer and semi-trailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semi-trailer (including in each of the above cases parts or accessories therefor

sold on or in connection therewith or with the sale thereof), 5 per centum. A sale of an automobile truck, bus, or truck or bus trailer or semi-trailer, shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(b) Other automobile chassis and bodies, chassis and bodies for trailers or semi-trailers suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 7 per centum. A sale of an automobile, trailer, or semi-trailer shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(c) Parts or accessories (other than tires and inner tubes and other than radios) for any of the articles enumerated in subsection (a) or (b), 5 per centum; * * *

§ 3441. Sale Price.

(a) In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

No. 11,327

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL A. PORTER, Administrator, Office of Price Administration,
Appellant,

vs.

KENNETH W. TROWBRIDGE, doing business as Kenneth W. Trowbridge Co., and Precision Motor Parts,
Appellee.

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No. 11,327

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL A. PORTER, Administrator, Office of Price Administration,

Appellant,

vs.

KENNETH W. TROWBRIDGE, doing business as Kenneth W. Trowbridge Co., and Precision Motor Parts,

Appellee.

BRIEF FOR APPELLEE.

May it please the Court:

The presentation of the case by appellant in this Court follows the pattern of looseness, vagueness and inaccuracy of his presentation in the Court below.

He says at his page 2, "The judgment dismissing the action was entered on December 10, 1945. (R. 41.)" That reference, however, is merely to an "order for judgment", which is not the judgment. (*Haddock v. Pillsbury,* 9 Cir., 155 F. 2d 820.) We will therefore state the judgment in our Statement of the Record, infra.

Under his "Statement of Facts" (his pages 2 to 4) there is an entire omission of his answers to our interrogatories, and we will therefore state them under our Statement of the Record, infra.

His quotation of the "Stipulation" at his pages 3 and 4 is incomplete, through his deletion of a paragraph numbered 3. The stipulation is not to be read merely alongside the complaint, but under and in connection with appellant's answers to our interrogatories.

We therefore precede our argument with the following statement.

STATEMENT OF THE RECORD.

The complaint.

The complaint is an OPA stereotype amounting to little or nothing more than notice[1] pleading but nonetheless invulnerable to any motion to dismiss[2] grounded under

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[1]See discussion by Judge Ford before a Judicial Conference of the Sixth Circuit, 1 F.R.D. 315 et seq. Also the paper, "Simplified Pleading", 2 F.R.D. 456, et seq., by Judge Charles E. Clark, who has been a member of the Advisory Committee from the beginning. And see Whittier, *Notice Pleading,* 31 Harv. L. Rev., 501-522.

[2]There has been a revolution in pleading. *Leimer v. State Mutual Life Assur. Co.,* 8 Cir., 108 F. 2d 302, has become the leading case. Therein, at 306, Judge Sanborn ruled that under the new Rules "there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a *certainty* that the plaintiff would be entitled to no relief under *any* state of facts which could be *proved* in support of the claim". In substantially adopting that statement of the rule in the Fourth Circuit, in *Tahir Erk v. Glenn L. Martin Co.,* 116 F. 2d 865, 870, Judge Dobie (who has been a member of the Advisory Committee from the beginning) added: "In Hubbock v. Wilkenson, 1899, 1 Q.B. 86, 91 (C.A.), the court construed the equivalent of a motion to dismiss under the Judicature Act of 35 & 36 Vict. c. 66 (1873) (in

Rule 12(b) FRCP upon "failure to state a claim upon which relief can be granted". After stating the jurisdictions of the Court and of the appellant, the identity of the price regulation as MPR 452 as amended, and identity of defendant-appellee as a manufacturer of "rebuilt automotive parts", the "claim" states[3] that (R. 3-4),

> "Subsequent to" September 2, 1943 "defendant * * * sold * * * rebuilt automotive parts at prices in excess of" MPR 452 as amended. * * * "None of the said purchases was made for use or consumption other than in the course of trade or business[4] * * *.
>
> Three times the aggregate amount" of the excess "equals $25,077.00",

for which amount he prayed judgment. Appellee moved (R. 5) for particulars of that aggregate but the motion

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which Act there is found the roots of our present motion to dismiss), and stated that such order would be proper only where '* * * any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks.' See, also, Burstall v. Beyfus, 1884, 26 Ch.D. 35, 38." One or the other or both of the foregoing cases has been followed by citation in the Ninth Circuit (*Pierce v. Wagner,* 134 F. 2d 958, at 960 (and see the OPA complaint approved in *Bowles v. Glick Bros. Lumber Co.,* 9 Cir., 146 F. 2d 566)), and in the Fifth, Seventh and Tenth Circuits (*Kohler v. Jacobs,* 5 Cir., 138 F. 2d 440, 441; *Carroll v. Morrison Hotel Corp.,* 7 Cir., 149 F. 2d 404, 406; *Garbott v. Blanding Mines Co.,* 10 Cir., 141 F. 2d 679). As said in *U. S. v. Atlantic Basin Iron Works,* 53 F. Supp. 268, 271, a complaint "should not be dismissed, although as a pleading it is manifestly deficient". And *In re Stroh,* 52 F. Supp. 958, at 961: "Since the adoption of the Federal Rules * * * the theory of pleading in the federal courts has been completely changed."

[3]In two counts. Our statement collects the whole of the two.

[4]It was held in *Provisional Government of French Republic v. Cabot,* 59 F. Supp. 855, at 857, point 4, that this sentence "is a pure conclusion of law", but in the course of reversal in *Bowles v. Cabot,* 2 Cir., 153 F. 2d 258, at 260, col. 2, it was said, "That the Administrator chose to draw his complaint in the words of the statute is not objectionable."

was denied.[5] The denial was by Hon. A. F. St. Sure, the learned judge of the Court below who in an early case under the new Rules of Pleading, *Securities and Exchange Commission v. Timetrust, Inc.*, 28 F. Supp. 34, at 41 and 43, had said in June, 1939:

> "The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required. * * * Defendants' motion for a more definite statement or bill of particulars should be denied. If defendants need more definite or detailed information about the claim, they may obtain it through Rules 33 to 37, which provide a simple and expeditious method of discovery."

The implicit basis of such denial of issuable particulars is the rule that a motion before answer for a bill of particulars is addressed to the sound judicial discretion of the Court.[6] The test has come to be stated as follows:[7]

> "Rule 8(a)(2) must be kept in view in the administration of the other rules governing pleadings. And a plaintiff who, in compliance with it, has presented in his complaint 'a short and plain statement of the claim showing that the pleader is entitled to relief,' must be accorded immunity to a motion for a bill of particulars except to the extent that he may have stated

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[5]See R. 47, docket entry under October 9, 1944.

[6]The rule of discretion, both before and since the new Rules, is well stated and many Federal authorities collected by Judge Delehant in *U. S. v. Association of American Railroads*, 4 F.R.D. 510, at 528 to 530. And see 1 Moore, *Fed. Prac.* 656. It was stated in *Whitaker v. Whitaker Iron Co.*, 238 Fed. 980, at 993, that the discretion extends "to whether particulars shall precede discovery, or discovery precede particulars".

[7]Idem, 4 F.R.D. at 529.

his claim 'in such general terms that defendant can not understand the general nature of the charges and can not frame an answer' to them. Martz v. Abbott, D.C. Pa., 2 F.R.D. 17; Smith v. Buckeye Incubator Co., D.C. Ohio, 2 F.R.D. 134; Mitchell v. Brown, D.C. Neb., 2 F.R.D. 325; Best Foods v. General Mills, D.C. Del., 3 F.R.D. 275; Brinley v. Lewis, D.C. Pa., 27 F. Supp. 313; Walling v. Black Diamond Coal Mining Co., D.C. Ky., 59 F. Supp. 348."

U. S. v. Ass'n of American Railroads, 4 F.R.D. 510, 529.

Since the advent in 1942 of the statutory[8] OPA further particulars under complaints filed by it have been accordingly granted[9] or denied.[10] Particulars before answer hav-

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[8]The predecessor executive OPA was powerless to bring suit. See discussion in *Bowles v. American Distilling Co.,* 62 F. Supp. 20, at 23 and 24.

[9]*Bowles v. National Erie Corp.,* 3 F.R.D. 469; *Bowles v. Schultz,* 54 F. Supp. 708; *Bowles v. American Distilling Co.,* 62 F. Supp. 20; *Bowles v. Jacobson,* 4 F.R.D. 447; *Bowles v. Yankee Brewing Co.,* 4 F.R.D. 508; *Bowles v. Flotill Products Co.,* 4 F.R.D. 499; *Bowles v. Sebastopol Berry Growers Assn.,* 4 F.R.D. 502, modified 5 F.R.D. 178; *Bowles v. Deep Vein, etc. Co.,* 5 F.R.D. 140; *Bowles v. John F. Casey Co.,* 5 F.R.D. 143.

[10]*Bowles v. Karp,* 3 F.R.D. 327; *Bowles v. Curtiss Candy Co.,* 55 F. Supp. 527; *Bowles v. Anderson,* 4 F.R.D. 181; *Bowles v. Brazman,* 4 F.R.D. 318; *Bowles v. Brookside Distillery Products,* 4 F.R.D. 294; *Bowles v. Ohse,* 4 F.R.D. 403. In *Bowles v. Anderson,* 4 F.R.D. 181, it was said: "The object of a bill of particulars is to secure an amendment to the pleadings. However, as the judges have been saying, the office of the bill of particulars has become or is becoming obsolete. United States v. Hartmann, D.C., 2 F.R.D. 477. Bills of particulars are not favored. Klug v. Palmer et al., D.C., 2 F.R.D. 273. Moreover, the present Rules of Civil Procedure, 28 U.S.C.A. following section 723c, are now in process of amendment. The original rule in relation to bills of particulars (being a part of paragraph (e) of rule 12) has been entirely stricken out. The reason for the abandonment of the rule is that the identical information can be obtained more easily by interrogatories or any other of the discovery rules." For the history of change of attitude in the district courts, see *Ferrara v. Interstate*

ing been denied to him at bar appellee after[11] answering served interrogatories upon appellant. (R. 10.)

The issue under appellant's claim[12] as narrowed by him.

Justice Holtzoff[13] has recently stated in *Pierce v. Pierce,* 5 F.R.D. 125, that "One of the purposes of interrogatories

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Transit Lines, 5 F.R.D. 54. In *Galdi v. Jones,* 2 Cir., 141 F. 2d 984, at 992, col. 1, it is stated that the use of interrogatories, deposition or discovery is preferable to a motion under Rule 12(e) FRCP, and in marginal note 7 thereto it is added: "For a searching criticism of the misuse of Rule 12(e), see 1 Moore, *Federal Practice,* 1942 Supplement, 634-650."

[11]On October 6, 1944, the Court below adopted a new local rule numbered 26: "No interrogatories shall be served until after joinder of issue, unless for good cause the court orders otherwise." See Appendix A.

[12]The substitution of the word *"claim"* for the phrase, "the ultimate *facts* upon which the plaintiff asks relief", used in Rule 25 of the Equity Rules of 1912, and the alternative phrase, "the *facts* constituting the cause of action", as used generally in code pleading (see Calif. Code of Civil Procedure, § 426), was suggested in 1935 in Wheaton, *Manner of Stating a Cause of Action,* 20 Cornell Law Quarterly 185, at 209, and the Wheaton suggestion was adopted by Judge (then Professor) Charles E. Clark (who has been a member of the Advisory Committee from the beginning) in Clark and Moore, *A New Federal Civil Procedure: II. Pleadings and Parties* (1935), 44 Yale Law Journal 1291, at 1303, note 42. And see 1 *Moore, Fed. Prac.,* page 3. The purpose of the change is to reduce to or near the vanishing point trial and appellate rulings on pleadings with respect to the distinctions between evidentiary facts, ultimate facts, legal conclusions, and the meaning of "cause of action". "Now", say Clark and Moore, supra, at their page 1301, "it has come to be appreciated that the distinction is one between generality and particularity in stating the transaction sued upon and that considerable flexibility should be accorded the pleader". The next step is interesting: on August 23, 1946, the Advisory Committee submitted to the Supreme Court their "third and final" draft of proposed amendments, which *inter alia* eliminates motions for bills of particulars.

[13]Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure* (October, 1942), 41 Mich. L. R. 205-224, at 205,

is to narrow the issues". He had in that case denied, before answer filed, a motion for a bill of particulars, but now granted a motion for an order that interrogatories be answered, "for the purpose of expanding or specifying details of allegations contained in the complaint". And so at bar, appellant "narrowed the issue" by his answers to our interrogatories; he specified the details of his "claim" as follows:

> "Defendant * * * is a manufacturer of rebuilt automotive parts and accessories and as such subject to the Federal Manufacturer's Excise Tax. Prior to September 1, 1943," he "failed and neglected to pay such tax. Defendant in accordance with specific instructions from the Bureau of Internal Revenue, commenced paying said Manufacturer's Excise Tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943. On" that date he "issued a new price list '6' cancelling price list '5'. Said price list set forth prices 5%[14] in excess of previous prices with a reference on the face of the catalog 'with Federal Excise Tax included'." [R. 13, Answers 3, 4 and 5.]

As stated supra, the complaint says that "three times the aggregate amount * * * equals $25,077.00". That is three times $8359.00. Appellant specified that that amount

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says: "Discovery has three distinct purposes and uses. * * * These three uses of discovery are as follows:

(1) To narrow the issues, in order that at the trial it may be necessary to produce evidence only as to a residue of matters which are found to be actually disputed and controverted.

(2) To obtain evidence for use at the trial.

(3) To secure information as to the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured, as for instance, the existence, custody and location of pertinent documents or the names and addresses of persons having knowledge of relevant facts."

[14]The excise tax was 5%.

"was determined from defendant's Manufacturer's Excise Tax Returns with the Bureau of Internal Revenue at San Francisco for the months" September 1943 to May 1944. [R. 12-13, Answers 3, 4 and 5.]

"The amounts of tax for each month as set forth on defendant's Excise Tax Returns filed with the Bureau of Internal Revenue in San Francisco, California, are as follows:

September, 1943	$ 938.81
October, 1943	1060.38
November, 1943	1025.15
December, 1943	1276.25
January, 1944	1062.99
February, 1944	1000.00
March, 1944	1000.00
April, 1944	935.49
May, 1944	59.93
Total	$8359.00

All of the Manufacturer's Excise Tax paid by defendant, doing business as Precision Motor Parts, during said months were for sales of rebuilt automotive parts and accessories during said months." [R. 14-15, Answers 3, 4 and 5.]

The excise tax.[15]

The "Manufacturer's Excise Tax" was levied by § 606 of the Revenue Act of 1932, and in an amended form was codified in 1939 in the Internal Revenue Code, § 3403, the relevant portions of which as amended by the Revenue Act of 1941, § 544(b), read:

> "§ 3403. There shall be imposed upon the following articles sold by the manufacturer, producer, or im-

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[15]The tax had a stormy history of controversy and litigation, which explains why it was that the Collector at last gave "specific instructions" (R. 13) to appellee to commence collecting and paying the tax "beginning September 1, 1943". In *Skinner v. U. S.* (1934), 8 F. Supp. 999 (retreading tires), the opinion at page 1003 quotes opinion-letters of the Commissioner of Internal Revenue at different dates in 1932 ruling that "the process of retreading the tires by vulcanization is held to be a repair rather than a manufacturing process". In February, 1933, the Commissioner reversed the ruling. The Court reversed the latter ruling of the Commissioner, saying (8 F. Supp. at 1003, col. 2):

> "The court is of the opinion that section 602 of the Revenue Act of 1932 was meant to apply only to newly manufactured tires and that it does not include retreaded tires, such as are involved in the instant case, and that, in holding that it does include such retreaded tires, the Commissioner of Internal Revenue has exceeded the authority granted him under the act, and that such an interpretation is not a proper interpretation of the act."

For seven years after the Act of 1932, the Court rulings were against the Commissioner's assertion of taxability. One such, *Armature Exchange, Inc. v. U. S.* (1939), 28 F. Supp. 10 (reconditioning armatures) listed the rulings as follows (28 F. Supp. at 15, col. 1):

> "Instances of repairs or restorations of parts of automobiles, some of the type here involved, others of a different type, which have been declared not to amount to 'manufacturing' are: *Retreading tires* (Skinner Tire & Rubber Co. v. United States, D.C., 1934, 8 F. Supp. 999); rebuilding armatures (Monteith Bros. Co. v. United States, D.C., Ind. 1936, 18 American Federal Tax Reports, 1320); *rebabbiting connecting rods* (Hempy-Cooper Mfg. Co. v. United States, D.C. Mo., 1937; 19 American Federal Tax Reports, 1313; Bardet v. United States, D.C. Cal. 1938, Prentice-Hall Federal Tax Current Court Decisions for 1938, Par. 5.507); *rebuilding gen-*

porter, a tax equivalent to the following percentages of the price for which so sold:

(a) [Covers automobile truck bodies, chassis trailers.]

(b) [Covers other automobile chassis and bodies and motor-cycles.]

(c) Parts or accessories * * * for any of the articles enumerated in subsection (a) or (b), 5 per centum."

In the Act levying the tax, it is enacted that in "determining the price for which an article is sold * * * there shall be *excluded* the amount of tax imposed by this title, whether or not stated as a separate charge", Revenue Act of 1932, § 619(a), now I.R.C. § 3441(a). That language is carried into the text of Regulations 46 (Excise Taxes) § 316.8. In the report (H.R. Report No. 708, 77th Cong., First Session) of the Committee of Ways and Means on the Revenue Bill of 1932, under the original section numbering of the Bill, it is said:

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erators and armatures (Becker-Florence Electric Co. v. United States, D.C. Mo., 1938, Prentice-Hall Federal Tax Service Current Court Decisions for 1939, Par. 5.161)."

Accord, *Con-Rod Exchange, Inc. v. Hendricksen* (1939), 28 F. Supp. 924. But in turn, beginning in December, 1939, there was a series of decisions in Circuit Courts of Appeals ruling in favor of the Commissioner's claim of "manufacture", i.e., taxability: *Clawson & Bals, Inc. v. Harrison*, 7 Cir., 108 F. 2d 991 (connecting rods); *U. S. v. Armature Exchange*, 9 Cir. (1941), 116 F. 2d 969 (rewound armatures); *U. S. v. Moroloy Bearing Service*, 9 Cir., 124 F. 2d 373 (connecting rods); *U. S. v. J. Leslie Morris Co.*, 9 Cir., 124 F. 2d 371; *U. S. v. Armature Rewinding Co.*, 8 Cir., 124 F. 2d 589 (armatures and generators); *Hendricksen v. Seward*, 9 Cir., 135 F. 2d 986 (*res judicata*); *Monteith Bros. Co. v. U. S.*, 7 Cir., 142 F. 2d 139. And see *Niagara Motors Corp. v. McGowan*, 45 F. Supp. 346.

"Section 604. Sale Price. Section 604 provides rules for determining the sale price which is the basis of the tax. In general, this should be the manufacturer's or producer's price at the factory or place of production. * * * The amount of tax under this title is to be excluded.

It is not intended to require the tax to be separately charged. If no separate charge is made, the tax is to be presumed to be included. For example, the invoice may specify the charge for the merchandise as $100, plus $2.25 for the manufacturers' tax, or it may simply state the charge as $102.25 for the merchandise and in either case the manufacturers' tax will be $2.25. This has been found in Canada to be the most workable plan and the fairest to industry in general."

Therefore, whether or not a manufacturer states the price separately from the tax, the tax is not a part of the price. "If no separate charge is made, the tax is presumed to be included", but that is only a presumption; and the presumption disappears (*Ariasi v. Orient Ins. Co.,* 9 Cir., 50 F. 2d 548) in the face of appellant's answer to interrogatories, that "defendant * * * did not add a Manufacturer's Excise Tax to his price on March 31, 1942". (R. 14.)

Maximum Price Regulation 452.

MPR 452, "Manufacturer's Maximum Price for Automotive Parts", was originally issued August 19, 1943, effective September 2, 1943. It "covers all new and rebuilt automotive parts", § 1(c), as to which it supersedes the General Maximum Price Regulation, § 2. It stated, § 3, that "on and after September 2, 1943 * * * (a) No

manufacturer shall sell or deliver a part at a price higher than the maximum price permitted by this regulation". It "divides sales into two kinds", § 5, (a) Sales of parts at list prices, and (b) Sales of parts at non-list prices, and as to the former said:

> "(a) Sales of parts at list prices. 'List price' as used in this regulation means the price for a manufacturer's sale of a part which may be derived from a price list or price sheet published and generally distributed to the trade by him. When a list price is named in this regulation as the maximum price to a purchaser, it means the price adjusted for all applicable extra charges, discounts or allowances for sales to a purchaser of the same class."

By § 6 maximum prices were set at the list price in effect on March 31, 1942, for those manufacturers, such as appellee, who had a price list in effect on March 31, 1942;[16] i.e., the technique of price control adopted as to rebuilt automobile parts was the base period technique.[17] § 6

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[16]Subsequently, by Amendment 4, released March 25, 1944, effective March 30, 1944, there was initiated, through addition of new § 8a, "a new method for pricing rebuilt automotive parts, other than rebuilt motors". The present litigation embraces the period antedating that new method.

[17]"These techniques fall into three general categories:

1. The *base period* technique provides that the maximum prices on the commodities in question are those charged or asked for in some previous period. * * *

2. The *cost-plus* pricing technique establishes maximum prices on the basis of current or other cost to the seller, plus some specified margin or mark-up. * * *

3. The specified *'dollars-and-cents'* pricing technique establishes a uniform maximum price for all sellers of a particular commodity, or for all sellers in a given category, or for all sellers in a given area. * * *" *Office of Price Administration*, Fourth Quarterly Report, for the period ended January 31, 1943, pp. 33-34.

says, "This section sets maximum prices for sales by a manufacturer who (1) had a price list for the part being priced in effect on March 31, 1942", at those list prices as his maximum prices. Under the heading "Miscellaneous", § 15 provided:

> "Sec. 15. Federal and State taxes. (a) Any tax levied by any statute of the United States or statute or ordinance of any state or subdivision thereof which the manufacturer on March 31, 1942, added to the price paid by the purchaser shall not be included in the maximum price if such tax is stated separately from the purchase price, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part.
>
> (b) Any tax upon the sale or delivery of a part and any compensating use tax upon a part levied by any statute of the United States or statute or ordinance of any state or subdivision thereof and becoming effective on or after March 31, 1942, may also be collected by the manufacturer making such taxable sale or delivery in addition to the maximum price if such tax is stated separately from the purchase price, unless the manufacturer had increased his price on or before March 31, 1942, to reflect such new or increased tax, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part. * * *"

The trial record.

At R. 48 the clerk's docket entries in year 1945 show that on August 16 when the case was on the calender for trial it was ordered continued to October 2 for a pretrial conference, and the entry for October 2 shows "Pre-

Trial Conf., cont Nov. 20, for trial"; on the latter day the entry reads, "Ord con Dec. 4 for trial, Filed ans.[18] to interrogos propounded by deft". The entry for Dec. 4 shows the trial ordered continued to the next day, Dec. 5, the entry for which reads, "Trial before the Ct sitting without a jury, submitted, Filed deft's trial memo".[19] No oral testimony is noted in the docket, because there was none. In the interim, the entry under November 21 shows, "Filed stip re adding Mfgs excise tax", and at R 27 and 28 the "Stipulation" appears and at the latter page shows a filing mark of November 21, 1945. The body of the stipulation reads:

> "1. On March 31, 1942, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts. On said date, the Federal Manufacturers' Excise Tax was not added by defendant to the price paid by the purchasers of said rebuilt automotive parts; nor was said tax then considered or included by defendant in his calculation of producing costs as a basis of arriving at his ceiling prices.
>
> 2. Subsequent to the 2nd day of September, 1943, and prior to the filing of the Complaint in the above-

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[18]The answers by appellant to interrogatories put by appellee appear at R. 10 to 17, and at the latter page the filing mark appears as Nov. 20, 1945.

[19]This appears at R. 28 to 41, and at the latter page the filing mark appears as Dec. 5, 1945. It was a voluntary memorandum prepared by appellee in advance of the trial, and was written before the stipulation of facts was entered into. The memorandum was designed to expedite the trial by setting down appellee's views with respect to applicable law, for whatever aid the Court below might deem it afforded. Appellant did not reply to it nor argue the case either orally or in a brief in the Court below.

entitled action on the 2nd day of August, 1944, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts at ceiling prices, and, in addition, defendant collected, from the purchasers thereof, sums totalling $8359.00 to cover the Federal Manufacturers' Excise Tax. None of said sales were made for use or consumption other than in the course of the trade or business of the purchasers.

3. This stipulation does not preclude either party from offering, at the time and place of trial of said action, any evidence not in conflict with the facts hereinbefore set forth."

Appellant's "designation of contents of record on appeal", R. 45, did not call for a reporter's transcript of the oral proceedings at the trial on December 5, and hence appellant's record leaves the matter to conjecture. Under Rule 75 FRCP the burden of obtaining such a transcript was and is upon appellant. However, there is enough in the appellate record to show that the Court below had before it (1) the stipulation, and (2) appellant's answers to our interrogatories put under Rule 33 FRCP. As to the latter it is said in *Adams v. Hendel,* 28 F. Supp. 317, 318, col. 2, that "information furnished under Rule 33 may become part of the trial record: information furnished in response to a motion [for a bill of particulars] under Rule 12(e) becomes part of the pleadings". At this point some confusion enters into the situation when trial Courts use interrogatories as a quasi-motion for particulars. We are at this point concerned with the *effect.*

There are some *obiter* statements[20] made as *arguendo* illustration of some ruling on something else, including *Bowles v. Safeway Stores,* 4 F.R.D. 469, wherein the OPA successfully opposed a motion for particulars and then sought to use the order of denial as *res judicata* against interrogatories put to the plaintiff Administrator, as to which the Court said (4 F.R.D. at 471):

> "It is no objection to interrogatories propounded under Rule 33, supra, that the same information was sought in a motion to make more definite and certain, or for a bill of particulars, and denied. Interrogatories are evidentiary in character. They are not considered as a pleading in the case. Until they are offered in evidence by either party they will not be considered by the Court. 27 C. J. S., Discovery, §§55-68, p. 86, etc. Pleadings deal with ultimate facts. The distinction in ruling the motion to make more definite and certain, or for a bill of particulars, and objections to interrogatories is obvious. A ruling on the former is not res adjudicata of the latter."

That, of course, was a preliminary ruling and did not sharply present the actual situation of a case then on trial. The matter is stated in its true light in Wigmore, *Ev.,* § 2122 read with § 2121, i.e., a distinction is drawn between use of answers to interrogatories in the *same* case, § 2122, and their use in a *different* case, § 2121. When used in the *same* case they operate as *judicial admissions*

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[20] *Coca Cola Co. v. Dixi-Cola Laboratories, Inc.,* 30 F. Supp. 275, 279, col. 2 ("because the answers do not become evidence in the case unless voluntarily introduced by the interrogator as admissions against interest on the part of the party interrogated"), quoted in *New England Terminal Co. v. Graver Tank & Mfg. Co.,* 1 F.R.D. 411, 414, col. 2, and cited in *Bowles v.. Keller Glove Mfg. Co.,* 4 F.R.D. 450, 451, col. 2.

in that case. As Street, *Fed. Eq. Prac.*, § 1596, said with respect to use in the *same* case: "the document being before the court, the only thing to be considered is its legal effect". The *obiter* expressions mentioned supra, and the citation to Corpus Juris in the passage quoted from *Bowles v. Safeway Stores*, supra, are sound only with respect to the rule governing use of the answers in a different case, and when sought to be read before a jury in the same case. The unification of law and equity procedure under the new rules has done away with the former pure bill of discovery[21] in aid of an action at law, so that now in all cases tried without a jury, the courts may judicially notice the judicial admissions of the interrogated party to the case. Judicial admissions are judicially noticed, i.e., they are without need of formal "offer in evidence":

> "It is argued for the appellees that the answer in this case was not offered in evidence on the trial and that the admissions therein pleaded are not to be considered against the defendants, but we think the contention is without merit. Admissions in the plead-

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[21]Street, *Fed. Eq. Prac.* § 1596, published in 1909, states the practice with respect to answers in the *same* case quite simply and clearly:

> "In the practice of our courts, the actual reading of the answer as evidence at the hearing is dispensed with. The introduction of the bill and answer as pleadings suffices to bring those documents before the court for every purpose for which they can be legitimately used in the cause. Accordingly we no longer read of disputes over the right to *read* parts of the answer as evidence for the plaintiff. The question always is whether such and such a statement in the answer operates as evidence in favor of the plaintiff and whether it is to be taken as being qualified by such and such other statements in the answer. In other words, the document being before the court, the only thing to be considered is its legal effect."

ing upon which the trial was had and which was not amended or withdrawn must be deemed proven as judicial admissions and must be assumed against the pleader. Larson Co. v. Wrigley Co., 7 Cir., 253 F. 914; Greer v. Davis, 177 Ark. 55, 5 S. W. 2d 742; Clark-Montana R. Co. v. Butte & Superior Co., D. C. 233 F. 547-559; Butte & Superior Copper Co. v. Clark-Montana Realty Co., 9 Cir., 248 F. 609; Id., 249 U. S. 12, 39 S. Ct. 231, 63 L. Ed. 447; Jeffress v. New York Life Ins. Co., 4 Cir., 74 F. 2d 874, 876; Aiken Mills v. Boss Mfg. Co., 2 Cir., 65 F. 2d 344, 374; Turfitt v. Perales, 5 Cir., 63 F. 2d 659; Standard Acc. Ins. Co. v. Rossi, 8 Cir., 52 F. 2d 547, 548; Id., 8 Cir., 35 F. 2d 667, 670; Euclid Candy Co. v. Bank, 6 Cir., 48 F. 2d 757; Pullman Co. v. Bullard, 5 Cir., 44 F. 2d 347; Axelrod v. Osage O. & R. Co., 8 Cir., 29 F. 2d 712, 729; Sebastian Bridge Dist. v. Hedrick, 8 Cir., 4 F. 2d 346, 348."

Darling Shops v. Brack, 8 Cir., 95 F. 2d 135, 141.

Where interrogatories are filed for the purpose of obtaining discovery, the party's answers have the force of judicial admissions in the suit in which they are made, 31 C.J.S. 1086, § 309; 22 C.J. 342, § 389. Every Court takes judicial notice of its own records in the same case: *The Golden Gate,* 9 Cir., 286 Fed. 105, 106; *Kelly v. Johnston,* 9 Cir., 111 F. 2d 613, 615; *McDonough v. Owl Drug Co.,* 9 Cir., 75 F. 2d 45, 51.

"In a case on trial in any court its records are actually or constructively before the judge. He will therefore take judicial notice of them and the facts which they establish".

31 *C.J.S.* 620.

The doctrine of judicial admissions connotes, of course, use of the matter *against* the party making the statement, and hence affords no ground for use of his statement *by* the party, because it then becomes "a self-serving statement free from the hazards of cross-examination", *Bailey v. New England Mut. Life Ins. Co.,* 1 F.R.D. 494, 495, col. 2. At bar, the Court below in judicially noticing the answers to interrogatories could and did disregard appellant's legal opinions and conclusions with which his answers were sprinkled.[22]

The findings, to which we next turn, are supported by (1) the judicial admissions in appellant's answers, and (2) the stipulation.

The findings and judgment. (R. 42 to 44.)

The Court finds:

"1. * * *

2. On March 31, 1942, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts. On said date, the Federal Manufacturers' Excise Tax was not added by defendant to the price paid by the purchasers of said rebuilt automotive parts; nor was said tax then considered or included by defendant in his calculation of producing costs as a basis of arriving at his ceiling prices.

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[22]At R. 13, that collection of the excise tax amounted to "a price increase of 5%". At R. 14, "Defendant does not satisfy the condition" of MPR 452, and that collection of the tax was a collection of increase in "price". At R. 15, that the amounts in the monthly returns to the Bureau of Internal Revenue were "amounts * * * in excess of defendant's maximum price under" MPR 452.

3. Subsequent to the 2nd day of September, 1943, and prior to the filing of the Complaint in the above-entitled action on the 2nd day of August, 1944, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts at ceiling prices, and, in addition, defendant collected, from the purchasers thereof, sums totalling $8359.00 to cover the Federal Manufacturers' Excise Tax. None of said sales were made for use or consumption other than in the course of the trade or business of the purchasers.

4. The said tax was levied by section 606 of the Revenue Act of 1932, and in an amended form was codified in 1939 in section 3403(c) of the Internal Revenue Code, but prior to September 1, 1943, the Collector of Internal Revenue made no attempt to collect the said tax from, and it was not paid by, the defendant. On or shortly before September 1, 1943, the Bureau of Internal Revenue specifically instructed the defendant to commence paying said tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943, which the defendant did in the aggregate of $8359.00 mentioned in paragraph 3 hereinabove; and the amount of $25,077.00 mentioned in the second count of plaintiff's complaint is merely a trebling of said tax aggregate of $8359.00.

Conclusions and Judgment.

1. The Court concludes and adjudges that the plaintiff shonuld take nothing and that the plaintiff's complaint be dismissed, with costs to defendant.

2. The clerk of this court is directed forthwith to enter the judgment by notation thereof in the civil docket pursuant to Rules 58 and 79(a), FRCP."[23]

ARGUMENT.

I.

APPELLEE'S BASE DATE PRICES WERE NOT INCREASED.

Appellant's argument under his heading I begs the question by assuming that appellee increased his "base date" prices. He did not. There is neither evidence nor finding that appellee ever charged or collected a price in excess of his "base date" prices.

Under Section 6 of the Regulation,[24] if a manufacturer "Had a list price for the part being priced in effect on March 31, 1942", which is appellee's situation, then Section 6 "sets" his "maximum prices for sales" at those list prices. It is Section 6, not Section 15, that "sets maximum prices". Section 15 relates only to collection, by a seller, of a tax in addition to the *price*.

The language used in the taxing statute, i.e., in substance, "a tax imposed upon articles sold by the manufacturer", is language used over a long period of years in a succession of revenue acts,[25] and with respect to

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[23]See *Haddock v. Pillsbury,* 9 Cir., 155 F. 2d 820, and contrast the order for judgment there with the one here at R. 41.

[24]MPR 452, "Manufacturers' Maximum Prices for Automotive Parts", originally issued August 19, 1943. Under our "Statement of the Record", supra, see sub-heading "Maximum Price Regulation 452".

[25]Citations to the excise sections of the acts of 1917, 1918, 1921, 1924 and 1926, are collected in *U. S. v. Gamble-Skogmo,* 8 Cir., 91 F. 2d 372, 375, col. 2.

many species of "articles"; and under the Revenue Act of 1924 it was given the following analysis and explanation in *Indian Motorcycle Co. v. U. S.*, 283 U.S. 570, at 573-574:

> "Both parties rightly regard the tax as an excise, and not a direct tax on the articles named. But they differ as to the transaction or act on which it is laid. Counsel for the plaintiff insist it is on the sale. Counsel for the government regard it as laid on manufacture, production or importation, or, in the alternative, on any one of these *and* the sale. We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on first or initial sales—those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed. Counsel for the government base their contention on the requirement that the tax be paid by 'the manufacturer, producer or importer;' but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation."

In short, it is a sales tax on the first sale of a manufactured article, but not upon any subsequent resale. It is an excise on the article sold, and the amount of the excise is simply *measured* by the selling price. Out of that measurement there had grown up differences in commercial practices, the tax being billed as a separate item in the sale invoices of some manufacturers to their customers, while other manufacturers simply invoiced, with-

out invoice separation of the tax, at what came to be called a composite price.[26] And on occasion, still others through either ignorance or design simply overlooked or ignored the tax, i.e., did not consider it in calculation of cost of production and sale, nor invoice it to customers either as a separate item or in a composite price.

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[26]The phrase traces to Justice Cardozo. See *Golding Brothers Co. v. Dumaine,* 1 Cir., 93 F. 2d 162, at 164, 115 A.L.R. 664, at 666, where it is said: "It seems to be well settled that, where a sales contract provides that the purchaser is to pay a stated price and that alone, the purchaser cannot recover from the seller the amount of the tax, if the tax is later done away with by a repeal of the statute or by its being declared unconstitutional, or, if the tax is simply reduced, recover the amount of the reduction, even though the tax had not been paid by the vendor, or, if paid, refunded to him. Zinmaster Baking Co. v. Commander Milling Co., Minn., 273 N.W. 673; Cupples Co., Mfrs. v. Mooney, Mo. App., 25 S.W. 2d 125; Moore v. Des Arts, 1 N.Y. 359; Kastner v. Duffy-Mott Co., 125 Misc. 886, 213 N.Y.S. 128; Christopher v. Hoger & Co., Inc., 160 Misc. 21, 289 N.Y.S. 105; Texas Company v. Harold, 228 Ala. 350, 153 So. 442, 92 A.L.R. 523; Casey Jones, Inc. v. Texas Textile Mills, Inc., 5 Cir., 87 F. 2d 454; Heckman & Co., Inc. v. I. S. Dawes & Son Co., Inc., 56 App. D.C. 213, 12 F. 2d 154. This distinction is clearly pointed out in Wayne County Produce Co. v. Duffy-Mott Co., 244 N.Y. 351, 155 N.E. 669, by Mr. Justice Cardozo, then Chief Justice of the Court of Appeals of New York. In that case it appeared that the purchaser had contracted to pay a certain price for the goods, plus a tax of 10 per cent. It was there said: 'This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. In such a case the buyer is without remedy, though the annulment of the tax may increase the profit to the seller. Moore v. Des Arts, 1 N.Y. 359. This is a case where the promise of the buyer is to pay a stated price and to put the seller in funds for the payment of a tax besides. In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise.' Many of the other cases cited above draw the same distinction and point out that, where the item of the tax is absorbed in the total or composite price, the buyer is without remedy, though the annulment of the tax may increase the profits of the seller." The report of the case in 115 A.L.R. 664, is followed by a note at page 667: "Rights of buyer and seller inter se as affected by invalidity of, or subsequent changes or developments with respect to, tax."

After some conflicting decisions[27] in the lower Federal Courts, the Supreme Court in 1929 in *Lash's Products Co. v. U. S.*, 278 U.S. 175, said:

> "This tax was paid by the petitioner, calculated at 10 per centum of the sum actually received by it for the goods sold. But the petitioner had notified its customers beforehand that it paid the 10 per cent tax, and it contends that in this way it passed the tax on, and that the true price of the good was the sum received less the amount of the tax. The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Heckman & Co. v. I. S. Dawes & Son Co., 56 App. D.C. 213, 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. Still the question as to the meaning of the statute remains.
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> The petitioner supports its position by a regulation of the commissioner that when the tax is billed as a separate item it is not to be considered as an increase in the sale price. Naturally a delicate treat-

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[27]Stated as follows in the concluding paragraph of the brief for the United States in the case of *U. S. v. Lash's Products Co.*, 278 U.S. 175: "Several cases in the lower Federal courts have involved claims similar to that of the petitioner in the present case. In *Clicquot Club Co. v. United States*, 13 F. (2d) 655, the District Court for Massachusets decided in favor of the taxpayer, and no appeal was taken. In *Elmer Candy Co., Inc. v. Fauntleroy, Collector*, 19 F. (2d) 664, the District Court for the Eastern District of Louisiana decided in favor of the Collector. The judgment of the District Court was reversed by the Circuit Court of Appeals for the First Circuit, 24 F. (2d) 95. Certiorari was granted by this Court May 28, 1928, and the case is now pending as *Fauntleroy v. Elmer Candy Company, Inc.* [278 U.S. 664], No. 119, October Term, 1928. In *White Rock Mineral Springs Co. v. Edwards*, 23 F. (2d) 539, the District Court for the Southern District of New York decided in favor of the Collector."

ment of a tax on sales might seek to avoid adding a tax on the amount of the tax. But it is no less natural to avoid niceties and to fix the tax by the actual price received. Congress could do that as properly as it could have added one-tenth to the tax on the price as fixed by the other items determining the charge to the buyer. The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore, it is part of the price, and if the statute were taken literally, as there would be no reason for not taking it if it were now passed for the first time, there might be difficulty in accepting the commissioner's distinction even if the tax were made a separate item of the bill. But if, in view of the history in the solicitor general's brief, we assume with him that the practice of the commissioner has been ratified by Congress, we agree with his argument that the petitioner must take the privilege as it is offered. It did not bill its tax as a separate item, and the commissioner's regulations notified it that 'if the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price,' although they purported to make a different rule 'when the tax is billed as a separate item.' There has been some difference of opinion in the lower courts, but we regard the interpretation of the law as plain."

Reflection upon that quoted passage discloses that the Court settled the conflict simply by drawing a technical line of gossamer fineness between the tax and the economic burden of the tax. Clearly, in the cited case, the manufacturer "passed the economic burden[28] on", even

[28]See *Cudahy Packing Co. v. U. S.*, 7 Cir., 126 F. 2d 429.

if technically it could not be said that he "passed the tax on". And in the very first revenue act enacted after that decision of 1929 the Congress, through the Revenue Act of 1932, destroyed the gossamer line. In that Act, § 619(a), now I.R.C. § 3441(a), the Congress enacted that in "determining the *price* for which an article is sold * * * there shall be *excluded* the amount of tax * * * whether or not stated as a separate charge". (And see the quotation from the committee report, supra.[29]) Since 1932 "price" is not to be held as including "tax"; price and tax are things separate and apart, at least ever since 1932.

In *U. S. v. Jefferson Electric Mfg. Co.,* 291 U.S. 386, the Court had before it a group of cases from lower Federal Courts which, said the Court (291 U.S. at 392), contained "three lines of decision"; and at page 395 said, "We are of opinion that the view taken in the third line of decisions is right". The principal case in that line is *Boyle Valve Co. v. U. S.,* Ct. Cl., 38 F. (2d) 135, wherein a manufacturer's claim for a tax refund turned *inter alia* on whether he had passed the tax or tax burden on; and wherein *inter alia* it was said (38 F. (2d) at 137):

> "The determination whether the tax was collected by the manufacturer directly or indirectly from the purchaser; that is, whether it was added to the purchase price of the article upon the sale of which the tax was imposed, either as a separate item or as a part of the sales price, is an ordinary question of fact; one with respect of which the courts constantly review the Commissioner's determination and one

[29]Under our Statement of the Record, sub-heading, "The excise tax".

that is involved in almost every suit for refund. It is a question of a type requiring no particular skill or knowledge of accountancy, but merely the ability to weigh evidence and to determine when to believe a witness.

The report of the Ways and Means Committee of the House with reference to section 424 of the Revenue Act of 1928 makes it clear that the purpose of this section was to prevent the refund of excise taxes to a manufacturer when the manufacturer had not paid the tax, but had passed it on directly to the consumer, and had acted merely as a collecting agency; that a refund, under such circumstances, to the manufacturer would unjustly enrich such manufacturer who had not borne the tax but had merely collected it from the persons to whom the articles were sold."

The question, then, whether a manufacturer has "collected a tax" from his customer by burying the tax in his "price" is a simple question of fact. At bar, the Court below found that on the base date in March 1942 the tax "was not added by" defendant-appellee "to the price paid by the purchasers of" the excised articles; "nor was said tax then [in March 1942] considered or included by" defendant-appellee "in his calculation of producing costs as a basis of arriving" at his selling prices. The finding is supported by (1) appellant's answers to appellee's interrogatories and (2) the stipulation.

In short, our base date prices under Price List No. 5 were *not* changed or increased by Price List No. 6, but the latter simply stated, "with Federal Excise Tax in-

cluded",[30] i.e., a separate item of 5% "Federal Excise Tax" was *then* added to the "price". Appellant's argument (his page 5) that "There is no showing in the record that defendant obtained Office of Price Administration approval for his Price List No. 6 of September 1, 1943", begs the question. No approval is necessary under Section 6 of the Regulation when the base date price is not increased. Increase of price differs fundamentally and clearly from initiation of the collection of a sales tax.

A sales tax was not involved in the two cases cited by appellant at his pages 8 and 9. In the first one cited, *U. S. Gypsum Co. v. Brown,* 137 F. (2d) 360, the question was with respect to who, as between seller and buyer, should "bear the burden of the transportation tax of 3%" imposed by section 620 of the Revenue Act of [October 21] 1942, which the Act "imposed upon the amount paid * * * for transportation * * * from one point in the United States to another". The seller's base date prices in March 1942 for sales of its "products from its plant at Midland", California to purchasers in the three states of California, Nevada and Arizona, were under one or the other of "two sharply distinct methods of pricing". One was "f.o.b. the Midland mill", in which case the burden of the freight from the mill to destination" was upon the buyer, and the Court said, "The Price Administrator concedes that in the case of these f.o.b. mill sales the purchaser must bear the burden of the transportation tax", which concession and ruling is *against* the appellant

[30]See our quotation of appellant's answers to our interrogatories, supra, under the sub-heading, "The issue under appellant's claim as narrowed by him".

in the case at bar, in so far as any analogy may be attempted between a sales tax and a freight tax. The other pricing method was a *delivered* price, i.e., f.o.b. destination, under which the seller absorbed the cost of delivery under a delivered price that was uniform throughout the three states regardless of distance from the mill or varying costs of deliveries in the three-state area. The other case, *Galban Lobo Co. v. Henderson,* 132 F. (2d) 150, went off on similar grounds with respect to "a 22% surcharge on ocean freight rates for transporting sugar from Cuba to the United States Atlantic and Gulf ports", in the case of a Cuban seller of raw cane sugars on a "duty paid cost and freight basis".

More directly in point is a case not cited by appellant: *Bowles v. Stapleton,* D. C. Colo., 53 F. Supp. 336, the case of the excise tax of two cents a quart imposed in 1943 under an ordinance of the City of Denver on sales at retail of fluid milk in the city. The sellers of milk collected from milk buyers the two cents a quart in *addition* to their maximum base date price (March 31, 1942), and Judge Symes rejected the Administrator's contention that the sales price plus the excise could not lawfully exceed the base date "price" of March 31, 1942.

Appellant mis-states the controversy in stating, at his page 5, that "Defendant, however, seeks to derive authority for his new price list from the provisions of Section 15 of the Regulation". It was not a list of new prices, but simply a restatement of unchanged old prices of the base date (March 31, 1942), with the 5% tax now added to the base date price. The controversy is simply this. We did not seek to "derive authority" from Section 15.

Appellee's "authority" derived from Section 6, i.e., his price all along remained at his base date price. Appellant came into the Court below as a plaintiff and thereby assumed a plaintiff's burden of allegation and proof. The "claim" upon which he sought relief was made in a general allegation that appellee, as a manufacturer, sold automotive parts "at prices in excess of" MPR 452. Under that Regulation maximum *prices* are set by Section 6. Section 15 does *not* set prices, but relates solely to collection of *taxes*. Hence, appellee "derives authority" for prices from Section 6, and appellant's original burden as a plaintiff and his present burden as an appellant is a burden on *him* to show a violation of Section 6. In the Court below the first mention of Section 15 occurred when appellant as a plaintiff sought to shift his ground from the loose, general mention of "price" in his complaint, to the narrower ground of "excise tax", coupled with his citation and quotation of Section 15, in his answers to our interrogatories 3, 4 and 5. (See R. 13 and 14.) The procedural situation is therefore, in substance, that appellant as a plaintiff initiated a controversy whether appellee was prohibited by Section 15 from adding the tax to his permitted price under Section 6.

There are two independent reasons why Section 15 is not a good ground for appellant's suit for damages:

1. Even though it be assumed that Section 15, properly construed, was breached, there is no authority for a civil suit by appellant for damages for such breach. Appellant's power to sue, and the authority of the Court below to entertain a suit by him, are wholly statutory. The statutory basis of that power and authority are clearly

summarized in *Bowles v. American Distilling Co., et al.*, D.C. N.Y., 62 F. Supp. 20, which was an action by the Administrator for damages for deceit practiced upon him in the course of fixing of maximum prices by him, through false entries in the business records of the defendants. In the course of holding that the power to sue, and authority to entertain the suit, were absent, the Court said (62 F. Supp. at 23):

> "Section 24(1) of the Judicial Code confers upon the district court jurisdiction, 'of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue.' The Administrator is by law authorized to sue; but the nature of the proceedings he may initiate are specifically enumerated in the Act: (1) He may apply to the district court for an order in aid of his subpoena, 202(e); (2) he may sue for an injunction or for an enforcement order, 205(a); (3) he may certify the facts to the Attorney General when he has reason to believe that a criminal violation has been committed under the Act, 205(b); (4) he may intervene in actions between third parties where the Act or a regulation is the ground of claim or defense, 205(d); (5) he may institute treble damage actions 'on behalf of the United States', 205(e); (6) he may sue for the suspension of a license, 205(f); (7) he may petition the Supreme Court for a writ of certiorari to review a judgment of the Emergency Court of Appeals, 204(d).
>
> Nowhere, in this meticulously arranged arsenal of weapons at the disposal of the Administrator, do I find power to bring common law actions for deceit. It would seem too clear for argument that the words of Section 24(1) of the Judicial Code, 'authorized by

> law to sue' do not mean to sue in general but to prosecute the specific action under consideration."

Looking over that "arsenal of weapons" it is clear that the present suit for damages must rest upon Section 205(e), if it has any statutory support. That subsection authorizes suit, "If any person selling a commodity violates a regulation, order, or price schedule *prescribing a maximum price or maximum prices*". MPR 452 is, of course, such a "regulation" or "order", but it "prescribes a maximum price or maximum prices" only in Section 6, and the proof and findings at bar do not disclose any violation of Section 6. The authority to make the "regulation" or "order" came from Section 2(a) of the Price Control Act, which provides that the Administrator "may by regulation or order establish such maximum price or maximum prices". The authority for Section 15 of MPR 452, however, comes from a different source, i.e., Section 2(g) of the Price Control Act, "Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the *circumvention or evasion* thereof". A violation of a subsidiary regulation made pursuant to Section 2(g) is made unlawful under Section 4, and may be reached in a variety of ways, civil and criminal, by the Administrator or the Attorney General, but nowhere in the Act will be found authority for a civil suit for damages for violation of a subsidiary regulation promulgated under Section 2(g).

2. It is clear that there is a *casus omissus* in § 15 of MPR 452, which "is not unusual, particularly in legisla-

tion introducing a new system", *U. S. v. Weitzel,* 246 U. S. 533, 534. "A *casus omissus* does not justify judicial legislation", *Ebert v. Poston,* 266 U. S. 546, 554. Subsection (b) of § 15 of MPR 452 covers excises levied under any statute "becoming effective on or after March 31, 1942", and therefore does not touch the case at bar. Subsection (a) of § 15 extends to a tax or excise levied before March 31, 1942, but only if the manufacturer *added* it to his price on March 31, 1942. It is clear that § 15 of MPR 452 does not reach (i. e., there is a *casus omissus* in) the case of an excise or tax levied before March 31, 1942, but which tax or excise, because of dispute or controversy about it or for any other reason or without reason, was not collected or paid by a manufacturer, nor added to or buried in his price, nor collected either directly or indirectly from his customers, i.e., neither the tax nor the economic burden of it was "passed on" to buyers or consumers.

Plaintiff expressly admits in his answers to interrogatories that defendant "*did not add* a Manufacturer's Excise Tax to his price on March 31, 1942". § 15(a) is *inapplicable* as a basis of the action, because it relates *only* to "any tax * * * which the manufacturer on March 31, 1942, *added* to the price". It is clear from the answers to interrogatories that the Bureau of Internal Revenue never collected the excise tax from defendant prior to September 1, 1943, at which time "defendant in accordance with specific instructions from the Bureau of Internal Revenue commenced paying said Manufacturer's Excise Tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943". Therefore, since § 15(a) of MPR 452

is inapplicable, and no other basis of liability is stated or shown, the action must necessarily fail.

The question is not one of validity or invalidity of Section 15 of MPR 452, but is a question of interpretation, and hence is open to this Court: *Bowles v. Seminole Rock & Sand Co.,* 5 Cir., 145 F. 2d 482, 484, col. 2; *Bowles v. Eastern Sugar Associates,* 64 F. Supp. 509, 511. And at page 513 of the latter case it is said:

> "Although the draftsmanship displayed in the regulations which we have just analyzed is inexcusably poor and creates a situation which is calculated to befuddle even the most astute legal mind, not to speak of the general public with respect to whom the regulations are promulgated, we believe, nevertheless, that the fairest interpretation to be placed upon them, considered as a whole, is that interpretation which counsel for the Sugar Company have insisted upon, because it has the merit of applying a literal interpretation to plain words when found to be in conflict with other plain words if likewise literally interpreted. In short, we believe that **if the Office of Price Administration, in drafting its regulations, is unable to say what it means in reasonably clear language, the public should not be penalized, but should be given the advantage of the ambiguity.**"

Appellant's argument at his page 13, i.e., that appellant is still liable for the excise and if he pays it will have to "absorb" it, is wholly specious. Appellant's statutory right of recovery must depend upon *his* right under the Price statute, not upon a claim of right in the Bureau of Internal Revenue under the tax statutes. It is not for appellant Administrator to reach out into usurpation of

the functions of the Bureau of Internal Revenue. Appellee's liability to pay the excise on sales during March, 1942, is not at bar in issue nor within the scope of the pleadings, stipulation or findings; and *non constat* whether the Collector of Internal Revenue approves the present litigation or is in either sympathy or conflict with appellant's theories in the suit at bar. Appellee will have a right to a day in Court *if* and when he is ever pursued by a *tax* collector. Until such pursuit there is nothing for appellee to "absorb" with respect to sales in March, 1942.

The plaintiff Price Administrator has no jurisdiction over the enforcement of collection of taxes or excises. His jurisdiction is over prices, which is a wholly different subject matter. The grant of jurisdiction to him is in the opening sentence of § 2(a) of the Emergency Price Control Act of 1942 (50 USC § 902(a)), and reads:

> "Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum *price* or maximum *prices* as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

Most wisely, the Congress reserved to itself and to the Bureau of Internal Revenue sole jurisdiction over taxes and excises.

The statutory authority to sue given under the Price Control Act, § 205(e) (50 USC § 925(e)), is addressed to

an overcharge in price, not to the addition or collection of a tax. The present suit is outside the authority given by the Congress.

II.

THE RECORD DOES NOT OPEN TO REVIEW THE RULING OF THE COURT BELOW ON APPELLANT'S INTERROGATORIES.

The interrogatories put by appellant to appellee appear at R. 17 to 19. In substance they inquire whether defendant added the excise to the price paid by his customers on March 31, 1942, and if so, the details of the sales; if not, when did payment of the excise by defendant begin, and the details of sales and excise amounts during the period of payment.

Now, *after* the sustaining of our objection to those interrogatories appellant entered into a *stipulation* with appellee completely embracing the whole of the specific subject matter of the interrogatories. The stipulation rendered the interrogatories *functus officio*. The interrogatories became simply a dead branch of the procedural tree. The doctrine of *functus officio* is "applied to something which has once had life and power, but which has become of no virtue whatsoever", 37 *C.J.S.* 1401. By writing the stipulation appellant wrote the answers to his own interrogatories. In *Moberg v. McCauley,* 273 Pac. 739, at 740-741, 150 Wash. 494, the Court said:

> "Appellant's first contention is that the court erred in striking the interrogatories. It is insisted that Rem. Comp. Stat. § 1225, providing for the examination of

any party to an action as a witness, and that he may be compelled to testify as any other witness, and Rem. Comp. Stat. § 1226, providing that, instead of the examination being had at the trial, either party, after filing his pleadings, may serve interrogatories for the discovery of facts and documents material to the support or defense of his action, compulsorily required the interrogatories to be answered.

The interrogatories chiefly asked about the taxes, assessments, and mortgages on the two properties, and the amounts of money paid to appellant's testator for the deeds, which she alleges in her own complaint. As to the taxes, assessments, and mortgages, they were matters of public record. As to the consideration paid for each lot, appellant herself alleged the consideration. Respondent was a witness at the trial, and was fully examined as to all the details of their transactions. **The only object of the interrogatories has been accomplished.** We can, therefore, find no abuse of discretion or prejudicial error in striking the interrogatories. Du Clos v. Batcheller, 17 Wash. 389, 49 P. 483; Brooke v. Boyd, 80 Wash. 213, 141 P. 357, Ann. Cas. 1916B, 359; Will v. Domer, 134 Wash. 576, 236 P. 104."

And it was said in *Brooke v. Boyd,* 141 Pac. 357, 358, 80 Wash. 213:

"Furthermore, the case is before us on the findings of fact made by the trial court, which the appellant says in his brief are full and substantially accurate. This being true, the appellant cannot have been prejudiced by the ruling of the court, since the only object sought by the interrogatories has been accomplished."

If the ruling of the Court below was erroneous, the error became harmless. The stipulation rendered the question abstract or moot. The ruling, however, was correct for the reasons stated in *Bowles v. Trowbridge,* 60 F. Supp. 48;[31] *Bowles v. Farmer's Nat. Bank,* 147 F. 2d 425; *Bowles v. Montgomery,* D.C. Pa., 66 F. Supp. 889; *H. Wagner & Adler Co. v. Mali,* 74 F. 2d 666, 670, cut-in 11. Appellant's brief relies heavily upon *Helvering v. Mitchell,* 303 U. S. 391, which was a ruling in a different context. The United States is "a body politic and corporate", *Helvering v. Stockholms Enskilda Bank,* 293 U. S. 84, 92. Compare *U. S. v. Cooper Corp.,* 312 U. S. 600. It was in its corporate capacity, as proprietor of the federal fisc, that the United States (through the Commissioner of Internal Revenue) was a party litigant in *Helvering v. Mitchell,* supra (303 U. S. 391). It was the proprietor or federal fisc owner of an ordinary income tax claim, a pecuniary claim, against Mitchell for $728,709.84, collection of which was being obstructed by the debtor Mitchell. The public corporation or body politic sought to enforce its civil rights as a money claimant by the additional civil remedy ("remedial sanction") of a 50% addition of $364,354.92 to the primary tax claim or money debt owing by Mitchell, the addition having been authorized, "sanctioned", by the Congress. *Held,* that Mitchell's contention of double jeopardy was bad, because the 50% was a civil remedy of the United States, a "civil sanction", a "remedial sanction" (303 U. S. at 399) and not a "criminal penalty".

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[31]This is the opinion in the case at bar, printed at R. 21 et seq.

That the foregoing is the true context of *Helvering v. Mitchell* is illuminated and made perfectly clear in the later case of *U. S. v. Hess,* 317 U. S. 537, at 549-550, where the Court cited *Helvering v. Mitchell* and explained the true ground of decision as follows:

> "It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. The statutes on which this suit rests, make elaborate provision both for a criminal punishment and a civil remedy. Violators of § 5438 may 'be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.' We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it. Helvering v. Mitchell, supra (303 U.S. 401, 82 L ed 923, 58 S Ct 630).
>
> It is, of course, well accepted that for one act a person may be liable both to pay damages and to suffer a criminal penalty. Long ago, this Court said, 'A man may be compelled to make reparations in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense.' Moore v. Illinois, 14 How (US) 13, 19, 20 14 L ed 306, 308, 309. Congress has 'power to give an action for damages to an individual who suffers by breach of the law.' Chattanooga Foundry & Pipe Works v. Atlanta, 203 US 390, 396, 397, 51 L ed 241, 244, 245, 27 S Ct 65. And it has this same power when it, rather than some private individual, is injured by a fraud. Quite aside from its interest as preserver of

> the peace, the government when spending its money has the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from frauds which may be practiced upon him. 'The powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection.' Cotton v. United States, 11 How (US) 229, 231, 13 L ed 675, 676."

The classification of wrongs into the two species of private wrongs and public wrongs as supplying the true test of whether a law is penal in the strict and primary sense is applicable here. If the United States were the buyer of a commodity and paid for it at a price in excess of OPA ceiling, and thereupon brought suit in its own name or through the OPA Administrator, then its complaint would show a private wrong to it and trebling the amount of the damage to it would be a remedial or civil sanction; but when *it* sues because some member of the public has overpaid, it sues for "a wrong to the public" as distinguished from a "wrong to the individual", and hence the latter suit is penal in the strict and primary sense. When the United States is itself an overcharged buyer, the "national economy" is damaged in a direct, pecuniary and understandable sense; when a member of the public is overcharged, we can understand how the particular individual's economy is similarly damaged, but to say in the individual's case that "the national economy" is *damaged*

is simply the creation of a fog, of no aid whatever to either legal analysis or sound judicial decision.

Dated, San Francisco, California,
November 6, 1946.

Respectfully submitted,
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No. 11338

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Ada J. Alberty,

Appellant,

vs.

United States of America,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

---

BRIEF OF APPELLANT.

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No. 11338

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ADA J. ALBERTY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

---

BRIEF OF APPELLANT.

I.

Jurisdiction.

The Information below charged the appellant with violation of the Act of Congress of June 25, 1938, known as the Federal Food, Drug and Cosmetic Act (52 Stat. at Large 1040; 21 U. S. C. 301 *et seq.*).

The lower court has original jurisdiction of all crimes and offenses cognizable under the authority of the United States (Rev. Stat., Sec. 563(2); 28 U. S. C., Sec. 41(2)).

This Honorable Court has appellate jurisdiction to review by appeal the final decisions of the District Courts (Judicial Code, Sec. 128, as amended; 28 U. S. C., Sec. 225(a)).

The decision of the court below finding the appellant guilty of the offense charged in Count 23 of the Information was entered on May 20, 1946. [R. 21.] Notice of appeal was filed on May 24, 1946. [R. 31.] The time for filing and docketing the record on appeal with this Honorable Court was extended to the 15th day of July, 1946, by order of the lower court [R. 33], and said record was filed and docketed on July 12, 1946.

II.

Statutes Involved.

Section 301(a) of the Federal Food, Drug and Cosmetic Act of June 25, 1938 (21 U. S. C., Sec. 331(a)), provides:

> "The following acts and the causing thereof are hereby prohibited:
>
> "(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded."

Section 502(a) of this Act (21 U. S. C., Sec. 352(a)) provides:

> "A drug or device shall be deemed to be misbranded—
>
> "(a) If its labeling is false or misleading in any particular."

Section 201(m) of this Act (21 U. S. C., Sec. 321(m)) provides:

> "The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

Section 303(a) of this Act (21 U. S. C., Sec. 333(a)) provides:

> "Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."

III.

Preliminary Statement.

This is a case of first impression: No appellate court has heretofore construed the provisions of Section 201(m) of the Federal Food, Drug and Cosmetic Act (21 U. S. C., Sec. 321(m)) here involved in a *criminal proceeding.*

The court below held that the phrase "accompanying such article" as used in Section 201(m) meant that "when a drug and a related circular, having a common source and a common destination, come together at their destination, they are united and become one in so far as the buying public is concerned, each, in effect, accompanying the other, whether they arrived at their common destination simultaneously or otherwise." [R. 27.]

The lower court then found the appellant guilty as charged in the Information where the agreed stipulation of facts showed that although the drug and related circular had a common source and a common destination, the drug was shipped in interstate commerce 71 days after

the related circular and they did not reach their common destination simultaneously.

The decision of the lower court holding that the circulars accompanied the drug within the meaning of the Food and Drug Act is an unwarranted construction of that Act and is unsound as a matter of law.

IV.

Statement of the Case.

On December 5, 1945, an Information containing 23 Counts was filed against the appellant by the United States of America, charging multiple violations of the Federal Food, Drug and Cosmetic Act of June 25, 1938 (21 U. S. C., Sec. 301 *et seq.*).

On January 1, 1946, the appellant filed a demurrer to the Information [R. 7-10], on the ground that it did not state facts sufficient to constitute a crime under the laws of the United States and was uncertain, ambiguous and unintelligible. The demurrer was overruled. [R. 13.]

Thereafter, all Counts of the Information were dismissed by the United States, with the exception of Count XXIII [R. 21], and the case under that Count was submitted to the Court upon an agreed Stipulation of Facts. [R. 14, 15.]

The Stipulation shows that on February 7, 1944, the appellant introduced into interstate commerce certain circulars pertaining to the drug calcium pantothenate, and that 71 days thereafter, on April 18, 1944, the drug itself

was introduced into interstate commerce by the appellant, both the literature and the drug being destined for the Natural Food Store in Kansas City, Missouri, the circulars arriving at their destination on February 11, 1944, and the drug arriving on April 25, 1944.

The lower court thereupon held that the circulars accompanied the drug and adjudged the appellant guilty of violating the Food and Drug Act. [R. 22-27.]

The question presented by this appeal is whether, as a matter of law, the circulars in question accompanied the drug within the meaning of the Act.

V.

Summary of Argument.

A. The Criminal and Penal Provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938, Should Be Construed and Interpreted Strictly Against the Government and in Favor of the Accused.

1. Issue Presented.
2. Statutes Defining Crimes Are to Be Strictly Construed.
3. Unambiguous Words Used in a Statute Are to Be Given Ordinary Meaning.
4. The Ordinary Meaning of the Word "Accompanying" Is "to go along with."
5. Decision Below Unsound as a Matter of Law.

VI.

ARGUMENT.

A. The Criminal and Penal Provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938, Should Be Construed and Interpreted Strictly Against the Government and in Favor of the Accused.

1. Issue Presented.

This appeal presents a question of judicial interpretation. The issue raised is whether the well-established, axiomatic rule of statutory construction that criminal and penal statutes are to be strictly interpreted should be applied to the criminal and penal provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938. The court below declined to apply the rule of strict construction invoked by the appellant and in finding the accused guilty of a crime under the criminal provisions of this Act, resorted to a liberal construction, because the "Act was primarily promulgated to protect the consuming public." [R. 25.]

The issue thus proffered perforces a balancing on the scales of two factors: The consuming public on the one side; the rights of an accused on the other.

The Food and Drug Act, drafted as it was to protect the consuming public from misbranded or adulterated food or drugs, touches the public welfare to an extent which admits of no exaggeration. When civil process is resorted to under the Act, as by way of injunction to re-

strain violation (Sec. 302(a)), or the adulterated or misbranded food or drugs are seized by way of libel of information (Sec. 304), such remedial provisions thereof should be—and have been—construed with liberality.

See:

United States v. Research Laboratories, 126 F. (2d) 42 (C. C. A. 9th—1942), *certiorari denied* 317 U. S. 656 (1942) (involving a libel of information);

United States v. Lee, 40 F. Supp. 801, reversed 131 F. (2d) 464 (C. C. A. 7th—1942), 143 A. L. R. 1451 (involving an injunction);

United States v. Seven Jugs, etc., 53 F. Supp 746 (D. C., Minn.—1944) (involving a libel of information).

When the criminal sanctions of the Act are invoked, however, which can circumscribe personal freedom, there should obtain a strict construction in favor of one accused of violating the Act. Individuals should not be punished without a clear forewarning from the Legislature as to those actions for which penalties may be invoked. The responsibility of Congress for manifesting its will in defining crimes would be ill served by an easy-going judicial construction of the criminal provisions of the Food and Drug Act.

In resolving the issue here, this Honorable Court must determine what yardstick must be employed in construing the word "accompanying" as it appears in Section 201(m) of the Act.

2. Statutes Defining Crimes Are to Be Strictly Construed.

It is a well established rule of statutory construction and interpretation that criminal and penal statutes must be strictly construed against the Government and in favor of the accused.

United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37 (1820);

United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 S. Ct. 625 (1890);

United States v. Chase, 135 U. S. 255, 34 L. ed. 117, 10 S. Ct. 756 (1890);

United States v. Noveck, 271 U. S. 202, 70 L. ed. 904, 56 S. Ct. 476 (1926);

Fasulo v. United States, 272 U. S. 620, 71 L. ed. 443, 47 S. Ct. 200 (1926);

United States v. Resnick, 299 U. S. 207, 81 L. ed. 127, 57 S. Ct. 126 (1936);

M. Kraus & Bros., Inc., v. United States of America, ... U. S. ....., 90 L. ed. (Adv. Op.) 653 (1946).

In *United States v. Wiltberger* the defendant was found guilty of manslaughter aboard an American ship anchored in a river. The defendant was indicted under the Act of Congress prohibiting manslaughter "on the high seas." The question was whether the place described in the Indictment was a part of the "high seas." The Supreme Court held that the offense charged was not cognizable in the courts of the United States, and used this language:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construc-

tion itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

"It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. *Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. . . .*" (Italics supplied.)

In *United States v. Chase, supra,* the defendant pleaded guilty to violation of the Act of Congress of July 12, 1876 (19 Stats. 90), for unlawfully and knowingly depositing in the mails of the United States an obscene letter. The Act in question prohibited the depositing in the mails of obscene "writing." The question was whether the term "writing" as used in the statute was comprehen-

sive enough to include the term "letter" as used in the Indictment. The Court held that the term "writing" did not include the term "letter," and used this language:

> "It must therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter. . . .
>
> "Another argument on which indictments of this character have been sustained by some of the circuit courts is, that a reasonable construction must be given the statute, and, it being evident that Congress intended to exclude anything of an obscene character from the mails, it is immaterial whether the thing prohibited is inside or outside of an envelope, and therefore unreasonable to hold that Congress intended not to allow a decent writing in an obscene envelope, but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. *But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress.*" (Italics supplied.)

In *Fasulo v. United States* the petitioner was indicted for conspiracy to violate Section 215 of the Criminal Code. The question was whether the use of the mails for the purpose of obtaining money by means of threats of mur-

der was a scheme to defraud within the meaning of that section. The Supreme Court reversed and said:

> "While, for the ascertainment of the true meaning and intention of the words relied on, regard is to be had to the evils that called forth the enactment and to the rule that a strict construction of penal statutes does not require the words to be so narrowed as to exclude cases that fairly may be said to be covered by them, it is not permissible for the court to search for an intention that the words themselves do not suggest. . . .
>
> ". . . The words of the act suggest no intention to include the obtaining of money by threats. There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute."

In *United States v. Resnick, supra,* the defendant's demurrer to an Indictment charging violation of a Federal statute forbidding the manufacture or sale of containers for fruits and vegetables was sustained. In that case the Act of Congress of May 21, 1928 (15 U. S. C., Sec. 257), declared that standard hampers for fruits and vegetables should be of specified size, and nine such sizes were listed. The defendant manufactured two-quart hampers, which was a size not provided for in the Act. The Supreme Court affirmed the decision sustaining the demurrer, and held:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. *United States v. Wiltberger,* 5 Wheat. 76, 95, 5 L. ed. 37, 42; *Fasulo v. United States,* 272 U. S. 620, 628, 71 L. ed. 443, 445, 47 S. Ct. 200. The clause

> just quoted is crucial; its words are plain and, having regard to the connection in which they are used, must be given the meaning naturally attributable to them. It is obvious that they do not extend to hampers other than the nine classes defined in §1. . . . Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses. *United States v. Lacher,* 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 S. Ct. 625; *United States v. Chase,* 135 U. S. 255, 261, 34 L. ed. 117, 119, 10 S. Ct. 756; *Fasulo v. United States, supra.* . . ."

In the *Kraus* case, *supra,* our Supreme Court during the last Term applied the strict rule of statutory construction to a case involving the penal features of a regulation passed in pursuance to an Act of Congress, which Act is as vital to the consuming public as the Act in question. In the *Kraus* case the question was whether the petitioner corporation was properly convicted of a crime under the Emergency Price Control Act of January 30, 1942. The petitioner was convicted of violating this Act in evading the provisions of a Maximum Price Regulation by forcing customers to purchase unwanted goods on which there was no ceiling price in order to purchase other goods at the ceiling price. The regulation in question made no specific mention of such "tying agreements" or "combination sales," as such practice was common known. It merely provided that price limitations should not be evaded by any indirect method, whether in conjunction with an offer or sale of a price-regulated commodity alone or in conjunction with any other commodity. The Supreme Court applied the strict rule of construction to the regulation issued by the Price Administrator under the Emer-

gency Price Control Act and reversed the conviction below. The Court used this language:

> "The manifest purpose of Congress in enacting this statute was to preserve and protect the economic balance of the nation during a period of grave emergency, thereby achieving the prevention of inflation and its consequence enumerated in Sec. 1, 50 USCA Appx. Sec. 901, 11 FCA title 50, Appx. 25, Sec. 1. *Yakus v. United States,* 321 U. S. 414, 423, 88 L. ed 834, 847, 64 S. Ct. 660. That aim was implemented by criminal sanctions to be imposed on those who deliberately choose to ignore the national welfare in this respect by selling commodities at prices above established levels. As appears from a combined reading of §§ 205(b), 4(a) and 2(a), criminal liability attaches to any one who willfully sells commodities in violation of a regulation or order of the Price Administrator establishing maximum prices. *Cf. United States v. Eaton,* 144 U. S. 677, 36 L. ed. 591, 12 S. Ct. 764. Recognizing that sales at above-ceiling prices may be accomplished by devious as well as by direct means, Congress in Sec. 2(g) authorized the Administrator to make provisions against circumvention and evasion of maximum prices. Hence one who willfully sells commodities at prices above the maximum in an evasive manner specified by the Administrator subjects oneself to criminal liability. These statutory warnings are clear and unambiguous. When incorporated with such definite and clear regulations and orders as the Administrator may promulgate, the provisions of the Act leave no doubt as to the conduct that will render one liable to criminal penalties.
>
> "This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal

sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. See *United States v. Wiltberger,* 5 Wheat. (U. S.) 76, 94-96, 5 L. ed. 37, 42, 43. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.

"In applying this strict rule of construction to the provisions adopted by the Administrator, courts must take care not to construe so strictly as to defeat the obvious intention of the Administrator. Words used by him to describe evasive action are to be given their natural and plain meaning, supplemented by contemporaneous or long-standing interpretations publicly made by the Administrator. But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct

must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States v. Resnick,* 299 U. S. 207, 81 L. ed. 127, 57 S. Ct. 126."

Mr. Justice Rutledge, in a concurring opinion, said:

"Persons reading the regulations to determine what conduct had been forbidden were entitled in my opinion to conclude that the Administrator, whenever he thought tie-in sales were *per se* evasive or in violation of the Act's policy, had expressly so stated and conversely that where he had not expressly forbidden the practice, it was not to be understood as prohibited by general language applicable to many other types of situation but not specifically to this one. This view, I think, would be required if the regulations had been enacted in statutory form. As regulations they cannot be given broader content."

3. Unambiguous Words Used in a Statute Are to Be Given Ordinary Meaning.

The Supreme Court of the United States has recognized the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous. Where there is no ambiguity, however, there is no room for construction.

United States v. Chase, supra;

United States v. Wiltberger, supra.

Is the semantics of the word "accompany" so saturated with ambiguity as to justify a court in deviating from its common and usual acceptation? If that word is ambiguous, courts must give to it the ordinary meaning imparted by the lexicographer. It is in that sense that the legislative draftsmen are presumed to have used the word.

> *Caminetti v. United States,* 242 U. S. 470, 61 L. ed. 442, 37 S. Ct. 192 (1917);
>
> *United States v. Wurts,* 303 U. S. 414, 82 L. ed. 932, 58 S. Ct. 637 (1938);
>
> *Rosenman v. United States,* 323 U. S. 658, 89 L. ed. 535, 65 S. Ct. 536 (1945).

In the *Caminetti* case, involving an indictment under the White Slave Traffic Act of June 25, 1910, the Supreme Court in construing that statute said:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. . . .
>
> "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Hamilton v. Rathbone,* 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for 'any other immoral purpose,' or with the intent and purpose to

induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

"Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."

4. The Ordinary Meaning of the Word "Accompanying" Is "to go along with."

The word "accompany" is defined in Webster's New International Dictionary (Second Edition) to mean "to go along with"; or "to go with or attend as a companion or associate"; "to incur in association with."

In Funk & Wagnall's Standard Dictionary this word is defined to mean "to go along with or be associated with as a companion"; "to go or be sent with as an incidental or a concomitant."

The meaning of this word is clear and devoid of ambiguity. Under the decisions hereinabove discussed the court below erred in not construing the word "accompanying" as used in the Act to mean "to go along with." It held that, albeit the alleged offending circulars were shipped seventy-one (71) days prior to the shipment of the drugs, the circulars and drugs accompanied each other. There was no authority in the court to thus enlarge, stretch and expand the ordinary meaning of that word.

Cf.:

American Federation of Labor v. National Labor Rel. Bd., 308 U. S. 401, 84 L. ed. 347 (1940);

Hecht v. Malley, 265 U. S. 144, 68 L. ed. 949 (1924).

By so doing, it surreptitiously invades the constitutional province of the lawmakers and indulges in hypercriticism to escape the plain import of the word. The court below lacked authority to extend by intendment the statute defining the crime because it thought the legislature should have been more comprehensive or because the salutary objectives of the Food and Drug Act should not be "circumvented by permitting a lapse of time to exist between the shipment of the drugs and offending leaflets from a common source to a common destination." [R. 23.]

Cf.:

Seven Cases v. United States, 239 U. S. 510, 60 L. ed. 411 (1916);

United States v. Weitzel, 246 U. S. 533, 62 L. ed. 872 (1918).

Congress was empowered in the first instance to define the sense in which the word "accompanying" was employed in the Act (*Cf. Collins v. Texas,* 223 U. S. 288, 56 L. ed. 439 (1912); *Re Monrovia Evening Post,* 199 Cal. 263 (1926)); and in exercising that power Congress had authority to supply its own glossary and one different from the dictionary meaning. See *Fox v. Standard Oil Co.*, 294 U. S. 87, 79 L. ed. 780 (1935). In Section 201 of the Act, Congress defined some sixteen (16) words. The word "accompanying" was left undefined, which strongly suggests that Congress intended the ordinary and usual meaning of that word to apply. The court below was not at liberty to assume that when Congress

said "accompanying" it meant "when a drug and a related circular, having a common source and a common destination come together at their destination, they are united and become one in so far as the buying public is concerned, each, in effect, accompanying the other, whether they arrived at their common destination simultaneously or otherwise." [R. 27.] Nor may the court presume that the omission by the legislators to give a different and unusual import to this word was inadvertent.

See:

> *United States v. Harris,* 177 U. S. 305, 44 L. ed. 780, 20 S. Ct. 607 (1900).

Probability is not a guide which the court in construing this word in a criminal proceeding can safely take.

> *United States v. Wiltberger, supra.*

To depart from the meaning expressed by the words of a statute is to alter it and is not construction, but legislation. That case must be a strong one indeed which will justify a court in departing from the plain meaning of words, especially in criminal or penal provisions of a statute, in search of an intention which the words themselves did not suggest.

> *United States v. Wiltberger, supra.*

5. Decision Below Unsound as a Matter of Law.

First, the lower court held that the circulars and leaflets accompanied each other even though there was a lapse of seventy-one (71) days between the shipping of circulars

and the drug because it felt that to hold otherwise would circumvent the salutary objectives of the Act. [R. 23.] This premise is false for several reasons: (1) The word "accompanying," strictly construed, does not cover a situation where such a lapse of time exists. Congress, had it seen fit, could have given a statutory definition to this word to extend to cases where a lapse of time exists and where the articles and the literature have a common origin and a common destination. (2) If a lapse of time between the shipment of the drugs and the circulars constitutes a circumvention of the Act, it is for Congress, not the courts, to ameliorate. *(Cf. United States v. Chase, supra; United States v. Wiltberger, supra.)* Indeed, Congress corrected the situation found to exist in the Food and Drug Act of 1906. In *United States v. American Druggists Syndicate,* 186 Fed. 387 (1911), the indictment charged the defendant with misbranding a drug under the 1906 Act, in that there was enclosed with the article of drug a circular containing false statements. A demurrer to the indictment was sustained on the ground the word "misbranded," as used in the 1906 statute, did not apply to a circular enclosed in the container. In order to prevent further circumvention of the Food and Drug Act, Congress passed the amendment of August 23, 1912 (21 U. S. C., Sec. 10, Third), and the provision regarding misbranding was changed to provide that a drug should be deemed misbranded if "its package or label should bear or contain" any false statement. (See *Seven Cases v. United States, supra,* construing this amendment.) (3)

If the leaflets, shipped separately, were false or misleading in a material respect, the sender would be amenable to the provisions of the Federal Trade Commission Act (15 U. S. C., Sec. 41 *et seq.*) and could not thus escape sanctions. There would be, in such case, no circumvention of law.

Second, the lower court did not apply the usual rule of strict construction of criminal statutes to the criminal and penal provisions of the Food and Drug Act, but gave to them a liberal construction in a criminal case, and relied upon decisions, in reaching such conclusion, which did not involve criminal proceedings, but involved civil cases. [R. 23-25, 26.] If the rule of strict construction is applicable to a Regulation issued under the Emergency Price Control Act, *a fortiori,* it is applicable to the Federal Food, Drug and Cosmetic Act. (*See M. Kraus & Bros., Inc., v. United States, supra.*)

Third, the lower court's holding that "when the drug and related circular came together the prohibited act occurred, irrespective of the circuitous route each may have traveled" [R. 25] and irrespective of the seventy-one (71) day lapse in time, is not judicial construction of the word "accompanying"; it is judicial legislation. A more sweeping construction of this statute cannot be conceived. The words of the lower court's pronunciation are at violent war with the words of the statute. The decision opens the floodgates: Under it conviction could be had where the lapsed time between the shipment of a drug and circulars is one year; or two years; or ten.

VII.

Conclusion.

The criminal and penal provisions of the Federal Food, Drug and Cosmetic Act should be strictly construed. The word "accompanying," as used in the Act, should be afforded its usual and ordinary meaning in a criminal prosecution thereunder.

The lower court's decision that the drug and leaflets accompanied each other within the purview of the Act where there was a lapse of seventy-one (71) days between the shipping of the circulars and the drug is unsound and should be reversed.

Respectfully submitted,

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No. 11341

United States
Circuit Court of Appeals
For the Ninth Circuit.

TOM RUSTAD, Owner and Claimant of the Oil Screw "MELODY," and FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation,

Appellants.

vs.

CHARLES WUORI, JOHN KURTTI, CYRUS C. CHRISTENSEN and ARMAND SYVANEN,

Appellees.

Apostles on Appeal

Upon Appeal from the District Court of the United States for the District of Oregon

FILED

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Rotary Colorprint, 661 Howard Street, San Francisco

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In the District Court of the United States
for the District of Oregon.

Civil No. 2868—In Admiralty

CHARLES WUORI, JOHN KURTTI, CYRUS CHRISTENSEN, and ARMAND SYVANEN,
Libelants,

vs.

Oil Screw "MELODY," and TOM RUSTAD, Owner,
Respondents.

LIBEL IN REM

To the Honorable James Alger Fee and Claude McColloch, Judges of the above entitled Court:

The libelant Charles Wuori, the owner and master of the Oil Screw "Stampede II," and the crew of such vessel, to-wit, John Kurtti, Cyrus C. Christensen, and Armand Syvanen, seamen and cook respectively, bring this Libel against the Oil Screw "Melody," now lying in the Port of Astoria, in the District of Oregon, and Tom Rustad, her owner, and against all persons intervening for their interest therein in a cause of salvage, civil and maritime, and libelants allege as follows:

First: That on or about the 22nd day of July, A. D., 1945, the Oil Screw "Melody," her home port being Petersburg, Alaska, whereof Tom Rustad was then and still is the owner and master, and having a crew of four (4) men besides the

master, cleared the Port of Astoria, in the District of Oregon, on a tuna fishing venture or voyage in the waters of the Pacific Ocean. [1*]

Second: That on or about the hour of 2:30 o'clock P. M. on the 24th day of July, A. D. 1945, in the waters of the Pacific Ocean, at a point approximately nine (9) miles North of the Columbia River and about nine (9) miles West or offshore from the Washington coast, the Oil Screw "Melody" was sighted by the libelants. That no one was aboard, nor was any vessel or party standing by for the purpose of rendering any assistance to the derelict vessel "Melody." The crew of said vessel had abandoned said vessel and said vessel was then and there a derelict. That at such time and place, the said Oil Screw "Melody" was entirely foundered, the only exposed parts thereof being a small section of a corner of the top section of her pilot house, a part of her mast, one-fourth of the forward bait tank and one-third of the aft bait tank. That her bulwark was above water for approximately a lineal distance of six feet, the highest portion above water being about one foot, said section of the bulwark referred to being the turn of the port stern of said vessel. The deck of said vessel at the point just described was above water for an area of approximately two square feet, said vessel having a heavy list to starboard.

That said Oil Screw "Melody," as libelants are advised and therefore allege the fact to be, had been

* Page numbering appearing at foot of page of original certified Transcript of Record.

for approximately two days engaged in fishing for tuna fish, and had on board approximately four (4) tons of ice for the purpose of preserving said catch, and at the time of her foundering had approximately five (5) tons of tuna fish, of the approximate value of $2,000.00.

That there were numerous and sundry lines and nets adrift attached to said vessel "Melody," thereby presenting the hazard of fouling the wheel of any vessel attempting to salvage said vessel, her paraphernalia, equipment and cargo.

That at such time a light Southwest wind was prevailing and the sea was light moderate, the weather clear, and the tide [2] was approximately at one-half ebb.

That said Oil Screw "Melody," her equipment, paraphernalia, fishing gear, and cargo of tuna fish, was, immediately prior to her foundering, of the approximate value of $39,000.00, being a new vessel, of the approximate length of 50 feet, built of wood. Said vessel was completed and launched in the year 1945.

Third: That at such time, the libelant Charles Wuori counseled with the members of the crew of the Oil Screw "Stampede II" concerning the possibility and hazards of salvaging said vessel "Melody." That by agreement between said master and the crew, libelant Armand Syvanen, at risk to his life and person, proceeded to board said derelict "Melody," at about the hour of 2:30 o'clock p.m., on said day, and made fast a tow line from the

"Stampede II" to the rudder stock of said vessel "Melody," it being the only available place to make fast a tow line. That after said tow line was made fast as aforesaid, the United States Coast Guard crash boat arrived with the abandoning crew of the vessel "Melody" on board, which said crew had been rescued from a life raft in the waters of the Pacific Ocean some two or three miles distant from the point where the derelict "Melody" was situated. That said crew had not theretofore been seen by any of the libelants. That none of the said crew went aboard the derelict "Melody" or the vessel "Stampede II," or made any offer of any assistance whatever in rendering salvage assistance to the derelict "Melody," but on the contrary, remained aboard the United States Coast Guard crash boat, and at about 3:30 o'clock P.M. proceeded to shore and absented themselves during the entire salvage operations and offered no assistance whatever. Thereupon, at about the hour of 4:00 o'clock P.M. on said day, the said master and crew of the vessel "Stampede II" proceeded with the derelict vessel "Melody" in tow on a course towards Whistle Buoy F.L.R. (2), off the mouth of the Columbia River, so as to be able to tow said derelict "Melody" [3] on a proper course into the Columbia River and a safe haven therein. That upon getting said tow under way, the said derelict "Melody" rode upon a more upright position, although still low at the bow. That the undertaking and proceeding with said tow was at considerable risk to the lives and persons of libelants and risk to the vessel

"Stampede II," this being especially true when entering the tidal currents and sets of the Columbia River.

That said derelict "Melody" at the time the libelants took her under tow had a minimum of buoyancy. In this respect, libelants believe and therefore allege the truth to be that such vessel was kept afloat by the ice in her hold, air pockets within her hull, and the fuel oil in her tanks, and upon the melting of said ice and the escaping of the air from said pockets, and the loss of said oil from her fuel tanks, and the replacement thereof with water, said vessel would sink and become a total loss. So at all times, there was imminent danger that said derelict might sink at any moment, and especially so if not kept under way.

There was present the hazard, upon entering into the tidal and current sets of the Columbia River, of the sinking of said derelict "Melody" as aforesaid and the fouling of the wheel of the vessel "Stampede II" in a manner that it could not be timely removed, resulting in the possible loss of the vessel "Stampede II," her equipment, paraphernalia, and fishing gear, on account of the actions of the current ever present at the mouth of the Columbia River, carrying said derelict and the vessel "Stampede II" into, over and upon Peacock Spit, or other equally dangerous shoal, situated at or adjacent to the mouth and bar of the Columbia River.

Fourth: That at the times herein mentioned,

said Oil Screw "Stampede II," her equipment, paraphernalia, and fishing [4] gear, was of the fair and reasonable value of $35,000.00. That at the time the said derelict "Melody" was sighted, the said vessel "Stampede II" was headed for the bottom fishing grounds to engage in a drag fishing venture, and had five (5) tons of ice, of the value of $25.00, on board, sufficient for a cruise of several days. That said vessel "Stampede II" is a heavy duty drag and tuna fishing vessel, of heavy construction, and powered with a 100 horse power "Caterpillar" Diesel engine, having a length of 45.45 feet and breadth of 14.1 feet, and a depth of 6.65 feet.

Fifth: That about the hour of 3:00 o'clock P.M., the master of said vessel "Stampede II" spoke by radio telephone to the United States Coast Guard, and advised them of the facts, and requested the said Coast Guard to make immediate search for the crew of the derelict "Melody," as well as to send assistance to the "Stampede II" and her crew for the purpose of attempting the salvage of the derelict "Melody." That in response thereto, the United States Coast Guard sent its oil screw life boat "Triumph," a vessel of the approximate length of 52 feet, beam 13 feet, and depth 6½ feet, and powered with 160 horse power Superior Diesel engine, and two gas screw life saving surf boats, each of the approximate length of 36 feet, beam 11 feet, draft 4 feet, and each powered with 100 horse power Sterling gas engine. That the "Triumph" arrived at the tow or salvage operations

at 5:50 o'clock P.M., and one life saving surf boat arrived approximately fifteen minutes earlier, and each of said vessels, at the request of libelant Charles Wuori, made fast a tow line to the derelict, and said two vessels, together with the vessel "Stampede II," proceeded with the tow, and upon arriving at a point on the main channel range of the Columbia River, approximately abreast of the West end of both the North and South Jetties of the Columbia River, at about the hour of 11:15 or 11:30 o'clock P.M. [5] the wheel of the vessel "Stampede II" became fouled with the tow line of the "Triumph." That the "Stampede II" released the tow temporarily to free her wheel, which was done sufficiently to permit her to continue the tow, and she was fully able and seaworthy and of sufficient power to continue the tow but, as a matter of supreme precaution and good seamanship, under the prevailing circumstances, the said vessel "Stampede II" at the request of her master, went under partial tow of one of the surf life saving boats above mentioned, and they stood by until the derelict "Melody" was successfully navigated over and across the Columbia River bar and well inside of the Columbia River. That said vessel "Stampede II," its owner and crew, were ready and able and it was their intention to resume the tow, if it became necessary, and to render any and all necessary assistance or services to the derelict "Melody" that might have been necessary to assure her safety. That said tow was completed at approximately 1:30 o'clock A.M. on July 25, 1945, when said

derelict "Melody" was beached on a level, firm, sandy beach near the United States Coast Guard Station at Hammond, Oregon, at approximately high tide. That approximately at 7:00 o'clock A.M., on July 25, 1945, the tide had receded sufficiently to start work on preserving the engine, equipment, paraphernalia and cargo of said vessel "Melody" from further damage on account of the sea waters. Thereupon, the Coast Guard, at the request of libelants, and in company with them, proceeded to remove the sea water from the hull and bilge of said vessel "Melody," which required approximately four hours' labor.

That immediately upon the vessel "Melody" becoming afloat, she was, at the request of said Charles Wuori, the master and owner of the vessel "Stampede II," towed by the United States Coast Guard to the Port of Astoria, where the cargo of tuna fish of such vessel could be and was unloaded and saved, which libelants [6] allege was the proper procedure to adopt to save such cargo under the circumstances above related. That such cargo of tuna fish was disposed of in the market in good merchantable condition, for the sum of approximately $2,000.00, the exact amount being unknown to libelants.

Sixth: That the value of the vessel "Melody," upon arriving at the termination of the tow and the sea water removed from her hull and bilge, together with her tackle, equipment, paraphernalia and fishing gear, was approximately $34,000.00.

Seventh: That at the time of the fouling of the wheel of the vessel "Stampede II" as above alleged, it was necessary for the "Stampede II" to release 100 fathoms of its tow line in order to free her wheel. This was lost to the "Stampede II," to the damage of the owner in the sum of $300.00, the fair and reasonable value thereof.

Eighth: That by virtue of the work as herein alleged as performed by the libelants, and the time required to secure additional cable to supplant the one lost as above mentioned, and to make minor repairs on such vessel on account of said salvage operations as above alleged, libelants were precluded from five days' time bottom fishing, and had said vessel engaged in such bottom fishing operations, it would have captured from fifteen (15) to twenty (20) tons of bottom fish, of the value of $2,000.00 to $3,000.00, thus sustaining a loss on account of such delays of the sum of $2,000.00 to $3,000.00. [7]

Ninth: That but for the assistance so rendered by the libelants, the said vessel "Melody," her equipment, tackle, paraphernalia, fishing gear, and cargo pending, would most certainly have been entirely and wholly lost, for said vessel "Melody" would not much longer have remained afloat but would have sunk in the waters of the Pacific Ocean or the Columbia River, and lost beyond recovery.

Tenth: That the said libelants, by reason of the perils necessarily incurred, and the great importance and nature of the services rendered by them

in saving said vessel "Melody" and her cargo, reasonably deserve to have and, therefore, claim a commensurate reward for salvage of the said vessel "Melody."

Eleventh: That all and singular the premises are true, and within admiralty and maritime jurisdiction of the United States and this Honorable Court. [8]

Therefore, libelants pray that process, in due form of law, according to the course ef the Courts of Admiralty and this Honorable Court, in a cause of admiralty and maritime jurisdiction, may issue against the Oil Screw "Melody," her tackle, equipment, paraphernalia, and fishing gear, and cargo, and that all persons having, or pretending to have, any right, title, or interest in the said vessel, and the cargo, may be cited to appear and answer all and singular the matters aforesaid; and that this Honorable Court decree such a sum, or proportion, of the value of the said vessel "Melody," her tackle, equipment, paraphernalia and fishing gear, and cargo, to be due the libelants as a compensation of the said salvage services as shall seem to the Court meet, together with their expenses in this behalf,

and such other further relief, or distress, as the Court may be competent to give in the premises.

CHARLES WUORI,
Owner.

JOHN KURTTI,
Seaman.

CYRUS C. CHRISTENSEN,
Seaman.

ARMAND SYVANEN,
Cook.

/s/ JAY BOWERMAN,
Proctors for Libelants.

State of Oregon,
County of Clatsop—ss.

I, Charles Wuori, being first duly sworn, depose and say that I am one of the libelants in the above entitled cause, and that the foregoing Libel in Rem is true, as I verily believe.

/s/ CHARLES WUORI.

Subscribed and sworn to before me this 4th day of August, A.D. 1945.

(Seal) /s/ A. C. FULTON,
Notary Public for Oregon.

My Commission Expires Jan. 25, 1948.

[Endorsed]: Filed Aug. 8, 1945. [9]

[Title of District Court and Cause.]

CLAIM OF OWNER

Tom Rustad, owner of the Motor Vessel "Melody," her engines, tackle, etc., intervening for his interest in the same, appears before this Honorable Court and makes claim to said vessel, etc., and says that he is the true and bona fide owner thereof, and prays to defend this suit accordingly.

TOM RUSTAD,

Subscribed and sworn to before me this 11th day of August, 1945.

[Seal] JEAN C. BEARDSLEY,
Notary Public for Oregon.

My commission expires: July 8, 1946.

[Endorsed]: Filed Aug. 14, 1945. [10]

[Title of District Court and Cause.]

CLAIMANT'S STIPULATION TO ABIDE BY AND PAY THE DECREE

Whereas a libel was filed in this Court on the 8th day of August, 1945, by Charles Wuori et al., against the Motor Vessel "Melody," etc., for the reason and causes in said libel mentioned; and

Whereas a claim to said vessel has been filed by Tom Rustad as owner thereof,

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern,

that the stipulators undersigned are jointly and severally bound in the sum of Fifteen Thousand Dollars ($15,000.00), conditioned that the claimant above named shall abide by and pay the money awarded by the final decree against the said vessel, her engines, tackle and gear, rendered in the cause by this Court, or, in the case of an appeal, by the Appellate Court.

TOM RUSTAD,
Claimant.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By CLARENCE D. PORTER,
Attorney in Fact.

Executed this the 14th day of August, 1945.

[Endorsed]: Filed Aug. 14, 1945. [11]

[Title of District Court and Cause.]

ANSWER TO LIBEL

To the Honorable Judges of the above entitled Court:

To Rustad, both as claimant of the "Melody," etc., and personally, brings this, his answer to the libel in this cause, and thereupon admits, denies and alleges as follows:

Article I.

Answering the first article of the libel said Rustad, claimant and respondent, admits the same.

Article II.

Answering the second article of the libel said claimant and respondent denies the whole thereof, except as now alleged, to-wit, the "Melody" was about five miles due west of Northhead Light. It is true that no one was then aboard her or standing by, but the Coast Guard was within easy call, and in fact soon arrived on the scene. The "Melody" was lying on her starboard side half submerged, but was not foundered; but on the contrary, was floating and would have floated indefinitely, and in fact did float during all the ensuing hours while she was being towed into the Columbia River and to the Point Adams Coast Guard Station, where she did not arrive, according to the allegations of the libel, until 1:30 a. m., July 25th—a period of 11 hours. The crew of the "Melody" had not abandoned said vessel and she was not a derelict, the master and the crew having been [12] separated from her by the force of the wind which blew their rubber life-raft away from her, she drifting with the tide in the opposite direction, and in fact her master and crew returned to her with the Coast Guard about one-half hour after the "Stampede II" came to her. It is true that the "Melody" had been fishing for tuna fish, but not for the days alleged, but on the contrary for one day and four or five hours, and she had on board approximately four tons of ice and 3¾ tons of fish of the approximate value of $1400.00. It is not true, as alleged, that there were numerous and sundry lines and net adrift attached to the "Melody," or that there

was any hazard of any kind to the "Stampede II." It is true, as alleged, that there was a light southwest wind prevailing, with a light, moderate sea, and weather clear, and the tide at about one-half ebb. The "Melody" is 46.8 feet long, not 50 feet as alleged, and she and her equipment, previous to her accident, were worth, not $39,000.00 as alleged, but not to exceed $20,000.00.

Article III.

For answer to the third article of the libel, claimant and respondent denies knowledge or information sufficient to form a belief of the allegations that the crew of the "Stampede II" consulted together about salvage, and the allegations that Syvanen risked his life in taking a tow-line to the "Melody," and calls for proof of the same. All the remaining allegations of said Article III claimant and respondent denies specifically, except as herein in this article of the answer admitted, and in this respect says that the facts are as follows: The United States Coast Guard crash boat, with the crew of the "Melody" aboard, arrived at the wrecked "Melody" and found that the "Stampede II" had a line aboard her. The master and crew of the "Melody" had never abandoned her, but had only left her as aforesaid because of wind and tide, and intending to get the assistance of the Coast Guard and return to her, [13] which they did, but on their return they found the master of the "Stampede II," with his line aboard the "Melody" and evidently determined to make a salvage case

out of it if he could, and opposed to any interference by the master and crew of the "Melody." The master of the "Melody," so far from not assisting as alleged in the libel, did as a fact, by the use of his rubber raft, and at the request of the "Stampede II's" master, transfer one of the crew of the "Stampede II" from the "Melody" back to the "Stampede II." Thereupon, there being nothing further that the men of the "Melody" could do, they proceeded toward Astoria in the Coast Guard crash boat, and arrived at the Point Adams Station at about 5:00 p. m., but the claimant and respondent is informed and therefore says that soon after his departure from the "Melody," the "Stampede II," having towed her but a short way, was met by two Coast Guard boats—one of them the "Triumph," and both these also put lines on the "Melody" and continued the towing, when at about Buoy 5A, and still outside the jetties, the "Stampede II," by her own unskillful maneuvering, fouled her propeller in one of the lines of the Coast Guard boat, and became disabled and was thereafter incapable of rendering any assistance, and was in fact, from that point on, herself towed by one of the Coast Guard boats into the Point Adams Station, and the other Coast Guard boat—the "Triumph," from that place on, towed the "Melody" in alone. Claimant and respondent further says that at Buoy 5A, which is off Peacock Spit, the "Melody" was in more dangerous water than she was in the open sea where the "Stampede II" first picked her up, so that in fact the "Stam-

pede II" did not contribute to her safety at all, but left her in a more dangerous position than she had been in at the start, and from then on it was solely due to the "Triumph" that the "Melody" was brought in. Any and all allegations of said Article II not herein admitted or denied on information and belief are hereby specifically denied.

Article IV.

For answer to Article Fourth, claimant and respondent denies that the "Stampede II" and her equipment, etc., were worth $35,000.00, and denied knowledge or information sufficient to form a belief of her true value and of the other remaining allegations in said article, and calls for proof of the same.

Article V.

For answer to the fifth article of the libel claimant and respondent denies the allegations therein, except as already hereinbefore admitted, and except as now further admitted, to-wit, claimant and respondent admits that the Coast Guard crew beached the "Melody" at the Point Adams Station, and on the morning of July 25th pumped her out, and thereafter towed her to Astoria, where the cargo of tuna fish was sold for approximately $1400.00.

Article VI.

For answer to the sixth article claimant and respondent denies every allegation therein, and says that the value of the "Melody," her tackle, etc.,

at the time therein alleged, was not to exceed $10,-000.00.

Article VII.

For answer to the seventh article of the libel claimant and respondent denies knowledge or information sufficient to form a belief of the allegations therein, but in this respect alleges that if the "Stampede II" lost any line, as claimed, it was through her own carelessness and unskilled maneuvering.

Article VIII.

For answer to the eighth article claimant and respondent denies the same, and every allegation therein.

Article IX.

For answer to the ninth article claimant and respondent denies the same, and every allegation therein. [15]

Article X.

For answer to Article Tenth claimant and respondent denies the same, and every allegation therein.

Article XI.

For answer to Article Eleventh claimant and respondent admits the admiralty and maritime jurisdiction of the Court, but denies that all or singular the premises of the libel are true.

Wherefore claimant and respondent prays that the libel may be dismissed with costs to this claim-

ant, and respondent, or for such other, further and different relief as to the Court may seem just.

TOM RUSTAD,
Claimant and Respondent.

WOOD, MATTHIESSEN & WOOD,
ERSKINE WOOD,
LOFTON L. TATUM,
Proctors for Respondents.

[Duly verified.]

[Endorsed]: Filed Aug. 14, 1945.]16]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL DECREE

And now, to-wit, on the 30th day of January, 1946, this case having been heard on the pleadings and proofs, and after argument for the respective parties, and deliberation thereof being had, the Court finds:

First: That the libelant Charles Wuori at and during all the times herein referred to was and is the master and owner of the Oil Screw "Stampede II" together with her equipment, paraphernalia and fishing gear, and that the crew of said vessel were John Kurtti, Cyrus C. Christensen and Armand Syvanen.

Second: That on or about the 22nd day of July,

A.D. 1945, the Oil Screw "Melody," her home port being Petersburg, Alaska, whereof Tom Rustad was then and still is the owner and master, and having a crew of four (4) men besides the master, cleared the Port of Astoria, in the District of Oregon, on a tuna fishing venture or voyage in the waters of the Pacific Ocean.

Third: That on or about the hour of 2:30 o'clock p.m. on the 24th day of July, A.D. 1945, in the waters of the Pacific [17] Ocean, at a point approximately nine (9) miles north of the Columbia River and about nine (9) miles west or offshore from the Washington coast, the Oil Screw "Melody" was sighted by the libelants. That no one was aboard, nor was any vessel or party standing by for the purpose of rendering any assistance to said vessel "Melody." That at such time and place, the said Oil Screw "Melody" was swamped, the only exposed parts thereof being a small section of a corner of the top section of her pilot house, a part of her mast, one-fourth of the forward bait tank and one-third of the aft bait tank. That her bulwark was above water for approximately a lineal distance of six feet, the highest portion above water being about one foot, said section of the bulwark referred to being the turn of the port stern of said vessel. The deck of said vessel at the point just described was above water for an area of approximately two square feet, said vessel having a heavy list to starboard.

That said Oil Screw "Melody" had been for ap-

proximately two days engaged in fishing for tuna fish, and had on board approximately four (4) tons of ice for the purpose of preserving said catch, and at the time herein referred to had tuna fish of the approximate value of $1,400.00.

That there were numerous and sundry lines and nets adrift attached to said vessel "Melody," thereby presenting the hazard of fouling the wheel of any vessel attempting to salvage said vessel, her paraphernalia, equipment, and cargo.

That at such time a light southwest wind was prevailing and the sea was light moderate, the weather clear, and the tide was approximately at one-half ebb.

That said Oil Screw "Melody," her equipment, paraphernalia, fishing gear, was, immediately prior to her swamping, of the approximate value of $25,000.00, being a new vessel, of the approximate length of 50 feet, built of wood. and said vessel was [18] completed and launched in the year 1945.

Fourth: That at such time, the libelant Charles Wuori counseled with the members of the crew of the Oil Screw "Stampede II" concerning the possibility and hazards of salvaging said vessel "Melody." That by agreement between said master and the crew, libelant Armand Syvanen, at risk to his life and person, proceeded to board said vessel "Melody," at about the hour of 3:20 o'clock p.m., on said day, and made fast a tow line from the "Stampede II" to the rudder stock of said vessel "Melody," it being the only available place to make

fast a tow line. That after said tow line was made fast as aforesaid, the United States Coast Guard crash boat arrived with the crew of the vessel "Melody" on board, which said crew had been rescued from a life raft in the waters of the Pacific Ocean some two or three miles distant from the point where the vessel "Melody" was situated. That said crew had not theretofore been seen by any of the libelants. That none of the said crew went aboard the vessel "Melody" or the vessel "Stampede II," or made any offer of any assistance whatever in rendering salvage assistance to the said vessel "Melody," except respondent Tom Rustad assisted in the removal of libelant Syvanen from the "Melody" to the "Stampede II" in the life raft, but, on the contrary, remained aboard the United States Coast Guard crash boat, and at about 3:50 o'clock p.m. proceeded to shore and absented themselves during the entire salvage operations and offered no assistance whatever. Thereupon, at about the hour of 4:00 o'clock p.m. on said day, the said master and crew of the vessel "Stampede II" proceeded with the said vessel "Melody" in tow on a course towards Whistle Buoy F.L.R. (2), off the mouth of the Columbia River, so as to be able to tow said vessel "Melody" on a proper course into the Columbia River and a safe haven therein. That upon getting said tow under way, the said vessel "Melody" rode [19] upon a more upright position, although still low at the bow. That the undertaking and proceeding with said tow was at considerable risk to the lives and persons of libelants and risk

to the vessel "Stampede II," this being especially true when entering the tidal currents and sets of the Columbia River.

That said vessel "Melody" at the time the libelants took her under tow had a minimum of buoyancy. In this respect, said vessel was kept afloat by the ice in her hold, air pockets within her hull, and the fuel oil in her tanks, and upon the melting of said ice and the escaping of the air from said pockets, and the loss of said oil from her fuel tanks, and the replacement thereof with water, said vessel would sink or likely to sink and become a total loss. So, at all time, there was danger that said vessel "Melody" might sink, and especially so if not kept under way.

Fifth: That at the times herein mentioned, said Oil Screw "Stampede II," her equipment, paraphernalia, and fishing gear, was of the fair and reasonable value of $35,000.00. That at the time the said vessel "Melody' ' was sighted, the said vessel "Stampede II" was headed for the bottom fishing grounds to engage in a drag fishing venture, and had five (5) tons of ice, of the value of $25.00, on board, sufficient for a cruise of several days. That said vessel "Stampede II" is a heavy duty drag and tuna fishing vessel, of heavy construction, and powered with a 100 horsepower "Caterpillar" Diesel engine, having a length of 45.45 feet and breadth of 14.1 feet, and a depth of 6.65 feet.

Sixth: That about the hour of 3:00 o'clock p.m., the master of said vessel "Stampede II" spoke by

radio telephone to the United States Coast Guard, and advised them of the facts, and requested the said Coast Guard to make immediate search for the crew of the said vessel "Melody," as well as to send assistance to the "Stampede II" and her crew for the purpose of attempting the salvage of the said vessel "Melody." That in response thereto, [20] the United States Coast Guard sent its oil screw life boat "Triumph," a vessel of the approximate length of 52 feet, beam 13 feet, and depth 6½ feet, and powered with 160 horse power Superior Diesel engine, and two gas screw life saving surf boats, each of the approximate length of 36 feet, beam 11 feet, draft 4 feet, and each powered with 100 horse-power Sterling gas engine. That the "Triumph" arrived at the tow or salvage operations at approximately 5:50 o'clock p.m., and one life saving surf boat arrived approximately fifteen minutes earlier, and each of said vessels, at the request of libelant Charles Wuori, made fast a tow line to said vessel "Melody," and said two vessels, together with the vessel "Stampede II," proceeded with the tow, and upon arriving at a point on the main channel range of the Columbia River, approximately abreast of the best end of both the North and South Jetties of the Columbia River, at about the hour of 11:15 or 11:30 o'clock p.m., the wheel of the vessel "Stampede II" became fouled with the tow line of the "Triumph." That the "Stampede II" released the tow temporarily to free her wheel, which was done sufficiently to permit her to continue the tow, and she was fully able and seaworthy and of sufficient

power to continue the tow, but, as a matter of precaution and good seamanship, under the prevailing circumstances, the said vessel "Stampede II," at the request of her master, went under partial tow of one of the surf life saving boats above mentioned, and they stood by until the said vessel "Melody" was successfully navigated over and across the Columbia River bar and well inside of the Columbia River. That said vessel "Stampede II", its owner and crew, were ready and able and it was their intention to resume the tow, if it became necessary, and to render any and all necessary assistance or services to the vessel "Melody," that might have been necessary to assure her safety. That said tow was completed at approximately 1:30 o'clock a.m. on July 25, 1945, when said vessel "Melody" was beached on a level, firm, sandy beach near the United States Coast Guard Station at Hammond, Oregon, at approximately high tide. That approximately at 7:00 o'clock a.m., on July 25, 1945, the tide had receded sufficiently to start [21] work on preserving the engine, equipment, paraphernalia and cargo of said vessel "Melody" from further damage on account of the sea waters. Thereupon, the Coast Guard, at the request of libelants, and in company with them, proceeded to remove the sea water from the hull and bilge of said vessel "Melody," which required approximately four hours' labor.

That immediately upon the vessel "Melody" becoming afloat, she was, at the request of said Charles Wuori, the master and owner of the vessel "Stam-

pede II," towed by the United States Coast Guard to the Port of Astoria, where the cargo of tuna fish of such vessel could be and was unloaded and saved, which was the proper procedure to adopt to save such cargo under the circumstances. That such cargo of tunt fish was disposed of in the market in good merchantable condition.

Seventh: That the value of the vessel "Melody," upon arriving at the termination of the tow and the sea water removed from her hull and bilge, together with her tackle, equipment, paraphernalia and fishing gear, was approximately $17,500.00.

Eighth: That at the time of the fouling of the wheel of the vessel "Stampede II," it was necessary for the "Stampede II" to release 300 fathoms of its tow line in order to free her wheel. This was lost to the "Stampede II," to the damage of the owner. That libelant Wuori expended the sum of approximately $25.00 for fuel oil, $..... for radio telephone, $..... for ice, and $..... for groceries, all the foregoing totaling $300.00.

Ninth: That libelants in engaging in said salvage operations lost a trip and a half of bottom fishing, at a loss to them of from $3,000.00 to $5,000.00. That libelants, rendered a valuable service in the salvaging of the vessel "Melody," its equipment, paraphernalia and cargo, and that the entire salvage operations in which both the libelants and the United States Coast Guard engaged were of the fair and reasonable value of $6,000.00. That the fair and reasonable value of the service per-

formed [22] by the United States Coast Guard in this respect is the sum of $2,000.00 and, therefore, the value of the service performed by the vessel "Stampede II" and the libelants is the sum of $4,000.00.

Tenth: That but for the assistance so rendered by the libelants, the said vessel "Melody," her equipment, tackle, paraphernalia, fishing gear, and cargo pending, were likely, to have been entirely and wholly lost.

Eleventh: The Court further finds that a stipulation was filed in these proceedings by respondent Tom Rustad, as Principal, and the Fidelity and Deposit Company of Maryland, as Surety, in the sum of $15,000.00, conditioned that the claimant above named should abide by and pay the money awarded by the Final Decree against the said vessel, her engines, tackle and gear, rendered in the cause by this Court, or, in the case of an appeal, by the Appellate Court.

The Court, therefore, finds as Conclusions of Law:

First: That libelants are entitled to a judgment and decree against respondent Tom Rustad, the vessel "Melody," her engines, tackle, gear and equipment, and the surety Fidelity and Deposit Company of Maryland in the sum of $4,000.00 for the services performed by libelants, together with the further sum of $300.00 for the loss of cable, and the cost of fuel oil consumed in making the tow, and

the cost of radio telephone, groceries and the loss of ice, together with their costs, and such judgment to constitute a lien against the said vessel "Melody," her engines, tackle, gear, and equipment.

CLAUDE McCOLLOCH,

Judge. [23]

It Is, Therefore, Considered, Ordered, Adjudged and Decreed that the above named libelant recover of and from respondents Oil Screw "Melody," her engines, tackle, gear and equipment, and Tom Rustad, and his stipulator Fidelity and Deposit Company of Maryland, the sum of $4,000.00 for their services as salvors as in the libel set forth, together with the further sum of $300.00 for the loss of cable and the cost of fuel oil consumed in making the tow, and the cost of radio telephone and groceries and the loss of ice, together with their costs;

And It Is Ordered that the said sum of $4,300.00 be distributed as follows:

1. $2,000.00 to libelant Charles Wuori, as owner and master of the vessel "Stampede II", her equipment, paraphernalia and fishing gear, together with the further sum of $300.00 cost of cable lost, and cost of fuel oil consumed, radio telephone, groceries, and ice lost, and the further sum of $..... costs of these proceedings.

2. $500.00 to libelant John Kurtti.

3. $500.00 to libelant Cyrus C. Christensen.

4. $1,000.00 to libelant Armand Syvanen.

It Is Further Ordered, Adjudged and Decreed that libelants shall have a lien against said vessel "Melody," her engines, tackle, gear and equipment, for the full amount of this judgment. That execution issue therefor.

Dated this 30th day of January, 1946.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Jan. 30, 1946. [24]

In the District Court of the United States
For the District of Oregon

Civ. No. 2868

Oil Screw MELODY and TOM RUSTAD, Owner and Claimant,

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation, Stipulator,

Appellants,

vs.

CHARLES WUORI, JOHN KURTTI, CYRUS C. CHRISTENSEN and ARMAND SYVANEN,

Appellees.

PETITION FOR APPEAL

Come now Tom Rustad, owner and claimant of the Oil Screw Melody, and Fidelity and Deposit

Company of Maryland, a corporation, stipulator, being aggrieved by the final decree, rulings and findings of the United States District Court in the above entitled cause, and, desiring to appeal from the entire final decree, rulings and findings of said Court, do hereby respectfully petition to the Court for an order allowing said appeal.

Dated this 22nd day of April, 1946.

TOM RUSTAD,
Owner and Claimant of the Oil Screw Melody,

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
a corporation, Stipulator.

By WOOD, MATTHIESSEN & WOOD,
Proctors for Appellants.

Service of the foregoing accepted this 22nd day of April, 1946.

JAY BOWERMAN,
Of Proctors for Appellees.

[Endorsed]: Filed April 24, 1946. [25]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

This matter came on regularly for hearing this day upon application of Tom Rustad, owner and claimant of the Oil Screw Melody, and Fidelity &

Deposit Company of Maryland, a corporation, Stipulators, appearing by one of their proctors, Lofton L. Tatum, for an order allowing petitioners' appeal in the above entitled cause, and, it appearing to the Court that said order should be entered,

It Is Ordered that the appeal herein be and the same hereby is allowed.

Dated this 24th day of April, 1946.

CLAUDE McCOLLOCH,
Judge.

Service of the foregoing accepted this 22nd day of April, 1946.

JAY BOWERMAN,
Of Proctors for Appellees.

[Endorsed]: Filed April 24, 1946. [26]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

The trial court erred in the following particulars:

I.

In holding, in effect, that the appellees rendered salvage services of a high order, entitling them to the awards made in the decree, instead of holding that the services were in the nature of towage, or at most salvage of a low order.

II.

In holding, in effect, that the Melody was in

serious danger and might sink, and that "but for the assistance so rendered by the libelants," she was likely "to have been entirely and wholly lost." This holding is especially erroneous because it ignores the presence of the Coast Guard, which was on the scene almost from the beginning, and in fact performed most of the towing.

III.

In holding that the appellees incurred danger to their persons and property; and in not holding that, on the contrary, there were no unusual risks incurred at all; nothing beyond an ordinary towing operation. [27]

IV.

In holding that appellee Syvanen boarded the Melody "at risk to his life and person."

V.

In holding that the Stampede II, after she fouled her wheel in the Triumph's line, stood by, and was ready and able to perform further services if needed; and in not holding that, on the contrary, she was, from this time on, disabled, and useless, and had to be towed in herself by the Coast Guard.

VI.

In holding that the value of the Melody, prior to the service, was $25,000, and after it, $17,000.

VII.

In holding that appellees lost $3000 to $5000 worth of fishing.

VIII.

In holding that the services rendered by appellees and the Coast Guard were, together, worth $6000, and in apportioning two-thirds of this to appellees.

IX.

In entering its decree awarding $4300 to appellees, apportioned as in said decree.

X.

In summarily including in said decree the stipulator Fidelity & Deposit Company of Maryland, without first giving it, in accord with admiralty practice, an opportunity to perform the engagement of its stipulation.

WOOD, MATTHIESSEN & WOOD,
Proctors for Appellants.

Service of the foregoing accepted this 22nd day of April, 1948.

JAY BOWERMAN,
Of Proctors for Appellees.

[Endorsed]: Filed April 24, 1946. [28]

[Title of District Court and Cause.]

CITATION ON APPEAL

To Charles Wuori, John Kurtti, Cyrus C. Christensen, and Armand Syvanen, and to A. C. Fulton and Jay Bowerman, their Proctors, Greeting:

Whereas, Tom Rustad, owner and claimant of the

Oil Screw Melody, and Fidelity & Deposit Company of Maryland, stipulator, have already appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the United States District Court for the District of Oregon in your favor, and have given the security required by law;

You Are, Therefore, Hereby Cited and Admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, in San Francisco, California, within forty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this 24th day of April, 1946.

CLAUDE McCOLLOCH,
Judge.

Service of the foregoing accepted this 24th day of April, 1946.

JAY BOWERMAN,
Of Proctors for Appellees.

[Endorsed]: Filed April 24, 1946. [29]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents that Fidelity and Deposit Company of Maryland, a Maryland

corporation authorized to do a surety business in Oregon, is held and firmly bound unto Charles Wuori, John Kurtti, Cyrus C. Christensen, and Armand Syvanen, in the sum of Two Hundred Fifty and no/100 ($250.00) Dollars, to be paid to said Charles Wuori, John Kurtti, Cyrus C. Christensen, and Armand Syvanen, their heirs and assigns, for the payment of which well and truly to be made, the undersigned Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The condition of this obligation is such that whereas Tom Rustad, owner and claimant of the Oil Screw Melody, and Fidelity and Deposit Company of Maryland, a corporation, Stipulators, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a final decree entered in the above entitled Court and cause on the 30th day of January, 1946.

Now Therefore, if the above named appellants Tom Rustad, and Fidelity and Deposit Company of Maryland, a corporation, shall prosecute said appeal with effect and pay all costs which may be [30] awarded against them if the appeal is not sustained, then this obligation shall be void. Otherwise the same shall remain in full force and effect.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Executed this 18th day of April, 1946.

[Seal] By /s/ CLARENCE D. PORTER,
Attorney in Fact.

Countersigned:

/s/ CLARENCE D. PORTER,
Resident Agent.

Service of the foregoing accepted this 24th day of April, 1946.

/s/ JAY BOWERMAN,
Of Proctors for Appellees.

[Endorsed]: Filed April 24, 1946. [31]

[Title of District Court and Cause.]

ORDER STAYING EXECUTION

Pending the appeal of this case, or until a further order of this Court or the Appellate Court,

It Is Hereby Ordered that execution of the decree entered in this Court on January 30, 1946, be stayed and that a bond in the amount of $4,300.00 be filed to stand as supersedeas bond.

Dated this 29th day of April, 1946.

CLAUDE McCOLLOCH,
Judge.

Service of the foregoing accepted this 29th day of April, 1946.

JAY BOWERMAN,
Of Proctors for Appellees.

[Endorsed]: Filed April 29, 1946. [32]

[Title of District Court and Cause.]

BOND ON APPEAL STAYING EXECUTION

Know All Men by These Presents that Fidelity and Deposit Company of Maryland, a Maryland corporation authorized to do a surety business in Oregon, is held and firmly bound unto Charles Wuori, John Kurtti, Cyrus C. Christensen and Armand Syvanen, in the sum of Four Thousand Three Hundred ($4,300.00) Dollars to be paid to the said Charles Wuori, John Kurtti, Cyrus C. Christensen, and Armand Syvanen, their heirs and assigns, for the payment of which well and truly to be made, the undersigned Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

Whereas Tom Rustad, owner and claimant of the Oil Screw Melody, and Fidelity and Deposit Company of Maryland, a corporation, stipulator, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree of the District Court of the United States for the District of Oregon bearing date of the 30th day of January, 1946, which decree orders the said Tom Rustad and Fidelity and Deposit Company of Maryland, a corporation, stipulator, to pay libelants the sum of Four Thousand Three Hundred ($4,300.00) Dollars, and

Whereas said Tom Rustad and Fidelity and Deposit Company, [33] a corporation, stipulator, desire during the progress of such appeal to stay the execution of the said decree of the District Court;

Now Therefore, the condition of this obligation is such that if the above named appellants, Tom Rustad, owner and claimant of the Oil Screw Melody, and Fidelity and Deposit Company of Maryland a corporation, stipulator, shall prosecute said appeal with effect and shall abide by and perform whatever decree may be entered by the United States Circuit Court of Appeals for the Ninth Circuit in this cause, or on the mandate of said Court by the Court below, then this obligation shall be void. Otherwise the same shall be and remain in full force and effect.

Executed this 29 day of April, 1946.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By CLARENCE D. PORTER
Attorney in Fact

Countersigned:
/s/ CLARENCE D. PORTER
Resident Agent

This bond approved as to form, amount and sufficiency of surety.

4/30/46.

CLAUDE McCOLLOCH

Service of the foregoing accepted this 30 day of April, 1946.

JAY BOWERMAN
Of Proctors for Appellees

[Endorsed]: Filed April 30, 1946. [34]

[Title of District Court and Cause.]

ORDER TO SEND ORIGINAL EXHIBITS TO APPELLATE COURT

It Is Hereby Ordered that the Clerk of this Court send to the United States Circuit Court of Appeals at San Francisco original exhibits Libelants' Numbers 1, 2 and 4, and Respondents' Number 3, as well as the original copy of invoice from Kern & Kibbe to Tom Rustad, dated August 22, 1945, all in this Court and cause for use on the appeal in this cause to said Appellate Court.

Dated this 7th day of May, 1946.

CLAUDE McCOLLOCH
Judge

Service of the foregoing accepted this 7th day of April, 1946.

JAY BOWERMAN
Of Proctors for Appellees.

[Endorsed]: Filed May 7, 1946. [35]

[Title of District Court and Cause.]

PRAECIPE

To Lowell Mundorff, Clerk of the above entitled Court:

You will please include in the apostles on appeal to be used in the appeal of the within case to the United States Circuit Court of Appeals for the Ninth Circuit, the following:

1. Libel in rem.

2. Claim of owner.

3. Claimants' stipulation to abide by and pay the decree.

4. Answer to libel.

5. Testimony as taken on the part of the libelants.

6. Libelants' exhibits Numbers 1 and 2.

7. Libelants' exhibit Number 4, only those pages (2) showing the July, 1945, tide table.

8. Testimony taken on the part of the respondents.

9. Respondents' exhibit Number 3.

10. Invoice from Kern & Kibbe to Tom Rustad, dated August 22, 1945.

11. Findings of fact and conclusions of law.

12. Final decree.

13. Petition for appeal.

14. Order allowing appeal. [36]

15. Assignments of error.

16. Citation on appeal.

17. Bond for costs on appeal.

18. Order staying execution.

19. Supersedeas bond.

20. Order to send original exhibits to Appellate Court.

21. Praecipe for apostles.

22. Docket Entries.

23. Stipulation re. time tables.

LOFTON L. TATUM
Of Proctors for Appellants

Service of the foregoing accepted this 7 day of May, 1946.

JAY BOWERMAN
Of Proctors for Appellees

[Endorsed]: Filed May 7, 1946. [37]

[Title of District Court and Cause.]

DOCKET ENTRIES

1945

Aug. 8 Filed libel in rem and personam.

Aug. 8 Issued warrant of arrest & Monition—to marshal.

Aug. 14 Entered order releasing boat on $15,000.00 bond. Fee.

Aug. 14 Filed claimant's stipulation to abide and pay decree.

Aug. 14 Filed claim of owner, Tom Rustad.

Aug. 14 Filed answer to libel.

Aug. 17 Filed warrant of arrest & monition.

Aug. 25 Filed motion for order setting for trial.

Aug. 29 Filed acknowledgment of the receipt of a copy of the libel.

Oct. 22 Issued 2 subpoenas for defendant.

1945

Oct. 29	Record of Pretrial Conf. McC.
Oct. 29	Record of trial—evidence adduced. McC.
Oct. 30	Record of trial—evidence adduced. McC.
Oct. 30	Entered order that information be obtained from Kern & Kibbe Co. McC.
Oct. 31	Record of trial. McC.
Oct. 31	Entered order that briefs be filed. Pltfs 2 weeks Defts 2 weeks & Pltf 1 week. McC.
Oct. 31	Filed exhibits #1, 2, 3, 4.
Nov. 10	Filed brief for libelants.
Dec. 3	Filed reply brief for libelants.
Dec. 4	Filed transcript Ex Parte Proceedings Aug. 14, 1945.

1946

Jan. 11	Entered order setting hearing on proposed Findings, Judgment and Decree for Jan. 21, 1946 at 10 a.m. McC.
Jan. 21	Filed record of hearing on proposed Findings, Conclusions & Decree argued & taken under advisement. McC.
Jan. 30	Filed & entered Findings of Fact, Conclusions of Law and Final Decree. Attys. notified. McC.
Jan. 30	Entered Judgment in Lien Docket.
Apr. 9	Filed judgment roll.
Apr. 24	Filed & entered order allow appeal. McC.
Apr. 24	Citation on appeal signed by Judge McColloch—to C.C.A. with transcript. McC.
Apr. 24	Filed petition for appeal.
Apr. 24	Filed assignments of error.
Apr. 24	Filed cost bond.

1946

Apr. 29 Filed & entered order staying execution. Attys. notified. McC.

Apr. 30 Filed bond on appeal staying execution.

May 7 Filed designation of contents for CCA.

May 7 Filed & entered order to send original exhibits to appellate court. McC.

May 22 Filed stipulation re tide schedule made part of apostles. [38]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed between the parties to this proceedings, by and through their respective proctors, that there shall be made a part of the Apostles on Appeal and printed in the record the following:

"All Tides Standard Times. For War Time Add One Hour.

July 24, 1945, Tuesday—Low Water, 7:16 A. M., 1.1 ft. Low Water, 7:04 P. M., 2.8 ft.

July 25, 1945, Wednesday—High Water, 0:55 A. M., 8.6 ft. High Water, 2:23 P.M., 6.8 ft.

/s/ WOOD MATTHIESSEN & WOOD

/s/ LOFTON L. TATUM

Proctors for Appellants

/s/ A. C. FULTON

/s/ JAY BOWERMAN

Proctors for Appellees.

[Endorsed]: Filed May 22, 1946. [39]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 40 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2868, in which Tom Rustad, Respondent and Owner and Claimant of the Oil Screw Melody and Fidelity & Deposit Company of Maryland, a corporation, Stipulator, are Appellants, and Charles Wuori, John Kurtti, Cyrus C. Christensen, and Armand Syvanan are Libelants and Appelles; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the Appellants and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and procedings had in said Court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is $38.80 and that the same has been paid by said Appellant.

I further certify that I have enclosed a dupli-

cate transcript of evidence dated October 29, 1945 (Testimony as taken on the part of the Libelants and Testimony taken on the part of the Respondents), together with Libelants' exhibits numbers 1, 2 and 4, Respondents' exhibit number 3 and Invoice from Kern & Kibbe to Tom Rustad, dated August 22, 1945.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of May, 1946.

[Seal] LOWELL MUNDORFF,

Clerk

By /s/ F. L. BUCK

Chief Deputy [40]

In the District Court of the United States
for the District of Oregon

Civil No. 2868

CHARLES WUORI, JOHN KURTTI, CYRUS C. CHRISTENSEN, and ARMAND SYVANEN,

Libelants,

vs.

Oil Screw "MELODY", and TOM RUSTAD, Owner,

Respondents.

Portland, Oregon, Monday, October 29, 1945.

10:48 o'clock a. m.

Before: Honorable Claude McColloch, Judge.

Appearances: Messrs. A. C. Fulton and Jay Bowerman, Proctors for the Libelants. Messrs. Erskine Wood and Lofton L. Tatum, Proctors for the Respondents.

Alva W. Person, Court Reporter.

PROCEEDINGS:

Mr. Fulton: If your Honor please, in this case here some of the facts took place during the presence of the petitioners [1] or libelants. Others of them took place in the presence of respondents. A few of them took place in the presence of both

* Page numbering appearing at top of page of original Reporter's Transcript.

parties, and consequently I don't think there is very much difference in the facts. It is my thought that we could try this case on the pleadings and save considerable time, and I think we could put our case on probably. I have four witnesses, just the members of the crew, that can tell our story. I don't think it will be necessary to call all of them. Probably two of them will be sufficient. They will be here if your Honor wants them. And I think the attorney here for the other party agrees with me on that.

I would be surprised if we couldn't pretty well clean up this case today. What do you think?

Mr. Wood: This is a salvage case, in which Mr. Futlon and Mr. Bowerman's client salvaged our vessel and sold the salvage.

We have subpoenaed for appearance tomorrow morning two chief mates at Point Adams and they will be here tomorrow morning at ten o'clock. For that reason we could not finish our case today.

We have the owner of the vessel claimed to have been salvaged and the marine surveyor, who will testify as to the value of the vessel, and those two Coast Guardsmen.

I agree with Mr. Fulton that there is very little necessity for pre-trial. It is just a question of fact. They [2] claim their vessel came up alongside of our vessel, put a line on it and towed it into Astoria and want the value of it for doing it. That is the essence of the case.

The Court: Well, it sounds simple, but why are you having this trial if it is simple?

Mr. Wood: That is easy, too. Mr. Fulton and his client claims $35,000 for the services and we don't think they are entitled to anywhere near that amount of money. It is a question of what they are entitled to.

Mr. Fulton: I don't understand we are asking for $35,000.

Mr. Wood: The value of the vessel was $35,000. At the time the bond was put up for release of this vessel they appeared before Judge Fee and stated a bond should be put up for the amount of $35,000. Judge Fee ordered a $15,000 bond. That is why I said that.

The Court: How much are you claiming, Mr. Fulton?

Mr. Fulton: We are claiming such amount as your Honor may think we are entitled to.

The Court: Yes, but I want you to name a figure before you get through, and I want Mr. Tatum to name a figure if he is going to take a position in the alternative.

Mr. Fulton: Well, I think we will be able to do that, in substance, anyhow, probably at the close of the trial.

The Court: All right. Call a witness. Let's start in.

Mr. Fulton: You don't want statement of the case made [3] before we start?

The Court: I read your papers the other day. I will be glad to hear you further.

Mr. Fulton: All right. Mr. Wuori.

LIBELANTS' EVIDENCE

The Clerk: Will you state your name.

CHARLES WUORI

was therupon produced as a witness in behalf of the Libelants and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Fulton:

Q. Will you please give your name, Mr. Wuori.

A. I am a little bit hard to hear. I can't hear.

Q. Will you please give your name.

A. My name is Charlie Wuori.

The Court: Do you want to sit in the box over there?

Mr. Fulton: Q. Mr. Wuori, speak up so the Judge can hear you. What is your name?

A. Charlie Wouri.

Q. Where do you live?

A. City of Astoria.

Q. How long have you lived there?

A. Well—— [4]

Q. You have to talk loud, Charlie.

A. Well, it is four years.

Q. Four years. Where did you live before that?

A. Out of Grays Harbor.

Q. Grays Harbor. What business are you engaged in? A. Fishing.

Q. What type of fishing? A. Deep sea.

Q. How long have you been engaged in the deep sea fishing? A. About thirty years.

Q. Do you own your own vessel?

A. Yes, I do.

Q. How long have you owned a vessel of your own?

A. Well, this present one is only four years old, but I have always had my own vessels.

Q. You have always owned your own vessel?

A. Yes.

Q. Just explain to the Judge what you mean by deep sea fishing. What type of deep sea fishing do you do?

A. Deep sea, many different types, halibut fish, drag fish and so forth.

Q. Just tell the Court the kind you have been engaged in.

A. The last four years I have been tuna fishing or drag fishing.

Q. Just briefly explain that to Judge McColloch. [5]

A. What do you mean, equipment?

Q. In equipment, and so forth; the size of your vessel, how it is constructed and how you are fixed. A. How do you want?

Q. How big is your vessel?

A. A 50-footer over all.

Q. What is the value of it?

A. About thirty-five thousand.

Q. Thirty-five thousand dollars. And is it of heavy construction?

A. Real heavy construction, yes.

Q. What kind of engine?

A. A hundred horsepower caterpillar.

(Testimony of Charles Wuori.)

Q. How old an engine is that?

A. Two years old.

Q. What is the value of that engine?

A. At the factory it is fifty-two hundred, besides the installation—engine alone.

Q. Now on the 22nd of July—I think that was the date; somewhere along about there—were you headed at sea, whatever date it was? What date was that?

A. Well, I cannot remember without the — I think it was the 24th.

Mr. Fulton: What date was that?

Mr. Tatum: The 24th. [6]

Mr. Fulton: Q. The 24th is right. All right. Now you just relate, from your own words, what took place on the 24th day of July, 1945. Just start from the beginning and tell the Judge the story right through, in your own words.

A. Well, we left Astoria in the morning; the time I cannot remember, what time we left; but anyhow, we started out for fishing, and then we went over the bar. Then we were somewhere around perhaps six or seven miles offshore and we sighted a vessel. It didn't really look the way the vessel should look from the distance, so we went closer and closer, and finally we saw it was a submerged vessel, only part of it wasn't. The whistle post, very little over the stern on top of the pilot house mast and fishing posts were up and some nets were hanging on the mast. So we thought the survivors might be around there somewhere. We made several circles

(Testimony of Charles Wuori.)
around it looking for survivors but we could not find anybody. So I made a telephone call to the Coast Guard at Point Adams to inquire about it, if they knew anything about the Melody and her crew, and they said they didn't know anything about it. So I made another telephone call through the marine operator about seeing our Columbia River Packers Association office and I talked to Frank Hoglund and inquired about it, what company this particular boat—who it was fishing for, and also—well, when I made the call next to the Coast Guard I asked him to send a couple of surfboats out, or lifesaving boats, so we were able [7] to get that in on the next flat tide in the Columbia.

Q. Did you ask them to make search for the crew?

A. I did. And also I made a telephone call to Frank Hoglund. I asked him to make another call for Coast Guard, and also tell him about trying to search for the crew. You see, the time when we could not find the survivors we thought they might have some explosion in the forecastle.

Q. I don't quite understand what you mean by that. You said you thought possibly there had been an explosion in the boat?

A. Yes, in the forecastle. I could not see any other way how a boat like that could have been sunk or submerged in the water. I thought it had been entirely under it and the survivors were in there.

(Testimony of Charles Wuori.)

Q. Just talk to the Judge. Then what did you do after that?

A. So I told Frank Hoglund I would not be able to keep the receiver around until we got the tow lines on it, and told him it seemed like it was sinking on our side, if they didn't try to get the line on it as soon as possible.

Q. Just explain to his Honor about what you meant by the receiver—could not keep the receiver up. What did you mean by that?

A. You see, we have got two-way radio, they call it, receiving and transmitting set.

Q. In other words, you meant that you were going to go to work?

A. We were going to work and not going to stand by the Melody? [8] Or I told Frank I am going to call him up as soon as I get the line on, which I did, and also the Coast Guard at Point Adams.

Q. All right. Did you have any discussion with your crew as to whether or not you would attempt salvage operations?

A. No. Well, we talked the matter over and said, "Maybe them whole crew is dead in there," and we try to get that thing in as soon as possible. I guess we could have made it alone but we only had about—well, it was just about half tide, half ebb left when we got there, and I thought it might sink under us if we don't get in with the next tide.

Q. What was the condition of the weather and the wind at that time?

(Testimony of Charles Wuori.)

A. There wasn't hardly any wind at all—very little wind. After thirty years of time I have been at sea I saw that much fine weather as there was. Seldom you see it, maybe once in five or ten years, such nice weather as that particular weather when we found it first.

Q. Were there any swells?

A. Yes, sir, quite a bit—ground swells.

Q. Just explain what ground swells are.

A. Well, a swell that wouldn't hardly get any force behind it.

Q. Long rollers? A. Long rollers.

Q. What direction was the wind, what wind there was? [9]

A. If anything it was southwest.

Q. Southwest? A. Yes.

Q. Now getting back to our time, what time was that you sighted this boat the first time approximately? I know you didn't log all of those things at the time, did you? A. No, no.

Q. Just tell the Judge.

A. We didn't have no bookkeeper, or anything like that, and when we are working it is next to impossible to tell just what time this and that had happened.

Q. What is your best judgment about what time it was when you first sighted the Melody?

A. It seems to me it was around two o'clock. I could not tell offhand now. At the time when my memory was fresh, when I was at your office——

Q. You have alleged in here about 2:30 P.M.?

(Testimony of Charles Wuori.)

A. Yes, I think it was somewhere around that.

Q. Now, you didn't make the line fast to the Melody yourself? One of your crew did that?

A. Yes.

Q. Who were your crew on that occasion?

A. Armand Syvanen.

Q. Who else, if any?

A. On board the boat? [10]

Q. Yes.

A. Cy Christensen and John Kurtti.

Q. Four of you?

A. Four of us; that including me, too.

Q. All right. Then after you had made the search did you telephone?

A. Yes. Then I telephoned after I search for the crew.

Q. Just tell what you did about making the lines fast; how was that done—your towline?

A. Well, one of the crew members, Armand, went down aboard the boat, and when we got down we throwed a heaving line up for him, and I don't know how long he worked. It seems to me it was quite a length of time because it was difficult to get a line any place there.

Q. Was there any danger in your opinion of anything; that is, making that line fast?

A. Yes.

Q. Just explain why.

A. Well, in the first place, the boat was submerged so much there wasn't hardly any place for foothold on it and he might slip.

(Testimony of Charles Wuori.)

Q. Go ahead.

A. I think the boat was listing, a 45 degree list in every direction.

Q. Did you watch Armand when he was tacking the line? [11]

A. Yes. Before he went on board the boat I told him about it. He could do it on his own risk, as I wouldn't go on there at any consideration.

Q. And you spoke to him about that?

A. Yes.

Q. You pointed out that there was danger?

A. Yes.

Q. How far was the Stampede—that was the name of your vessel? A. Yes.

Q. How far was that from the Melody at the time you made fast the line?

A. Well, we went pretty close to it at first to get him on board the boat. Then when he got on there we throwed heaving line for him. That is a lifeline, which you are able to throw quite a distance.

Q. Why didn't you want to stand close by the Melody?

A. By gosh, there was all kinds of ropes, nets and everything else is hanging around there and we might foul our wheel; then we would be helpless, too.

Q. All right. How was the line made fast? Of course Mr. Armand can tell that. But did you see him working there? A. I sure did.

Q. How deep was the water?

(Testimony of Charles Wuori.)

A. Well, I only saw his head.

Q. How was he dressed when he went aboard?

A. Undressed entirely, except two or three pair of socks?

Q. Did he have a pair of shorts on?

A. I think he had.

Q. How old a man is Armand, do you know?

A. I wouldn't know. I think he was around thirty-five.

Q. All right. After you made your line fast what happened?

A. Well, we were practically through. Armand was still aboard the boat.

Q. Then what happened? What is the next thing that took place?

A. Well, then, the U. S. Navy, or Army, or Coast Guard crashed.

Q. Crashed, c-r-a-s-h-e-d?

A. Yes, crashed. It is not really lifesaving station boats. It is one of them which has considerable speed. I think it makes at least thirty-five miles an hour, instead of an ordinary Coast Guard boat, only making from eight to ten. She arrived there. I asked them to assist us and they say they are not equipped for any towing, only for the life, not property. They were there for some length of time. I could not say offhand how long they were around there. Then they didn't make any attempt to help us, of any kind. It had sort of rubber life raft on it. We asked them to take one of my crew

(Testimony of Charles Wuori.)

members off of the Melody so that he didn't have to swim back, which they did, and then they left us.

Q. Did you request them to do anything?

A. Yes, I did, the first thing when they came.

Q. What did you ask them? Tell the Judge what you requested them to do.

A. Well, we asked them to help us tow them in, tow in the Melody, and they said they were not equipped for towing; just for saving life, not property.

Q. How about putting on some chafing gear?

A. Then I asked them, have they got anything to put on chafing gear, to prevent our rope, which was around the rudder-stock, chafing, but they didn't answer. They just left us. They didn't say "Yes" or "No."

Q. Were you ever refused any assistance on their part?

A. Yes, I asked assistance but they didn't do anything, except take the chafing gear off the Melody.

Q. What was the chafing gear?

A. Chafing gear could be anything, oilskin or anything, to prevent the rope when it comes at sharp angle, to prevent wearing it out.

Q. Then what happened from that time on?

A. They leave—they left.

Q. Did you at any time know that the crew of the Melody weren't aboard the Melody?

A. Never at any time.

(Testimony of Charles Wuori.)

Q. What is your best judgment how long they were there?

A. We couldn't tell. Of course, as I said, we never keep the time, but it seems to me it was five to fifteen minutes, somewhere [14] around there.

Q. That is the longest they stayed?

A. Yes.

Q. Then what is the next thing that happened after they left? A. After they left we——

Q. Had you started towing?

A. We were towing, and the time when they put one crew member back on the Stampede we started towing right away.

Q. Then after you started towing——

A. Then I——

Q. Mr. Wuori, I want to ask you one more question. Did you throw over any lead or make any soundings? A. Yes.

Q. To locate your position?

A. Yes. We had thirty-five fathom on the bottom.

Q. Where was that? Could you point out on the chart here your location at the time?

A. Yes, approximately.

Mr. Fulton: I would like to have the big chart, Mr. Bowerman.

The Court: Why don't you go down to the table? That is best.

Mr. Fulton: Just a moment. Are you willing to admit this thing as an exhibit?

Mr. Wood: Yes.

(Testimony of Charles Wuori.)

(The map so offered, designated "United States-West Coast Oregon-Washington. Columbia [15] River to Destruction Island. Soundings in Fathoms at Mean Lower Low Water," was thereupon marked Libelants' Exhibit 1.)

Mr. Fulton: Q. Referring now, Mr. Wuori, to Libelants' Exhibit No. 1, which is a chart of a certain area of the Pacific Ocean off the Washington Coast, just explain generally what this is, this chart or this exhibit.

A. Well, this one is offshore chart. All the soundings are in fathoms.

Q. Explain it. Where was your position at the time that you undertook the tow?

A. Well, our position was approximately there (indicating). I could not tell just exactly, but we have thirty-five fathoms or more water before we start to tow. I wasn't quite sure how far we were offshore without throwing the lead overboard.

Q. In other words, at this place that has been marked by a cross there is what you estimate the position of the Melody at the time you undertook the tow? A. Yes.

Q. And found it. All right. Now where is that?

A. It is about ten miles off from North Head, and ten miles off from North Whistler.

Mr. Bowerman: That is a buoy, isn't it?

A. Yes, sir.

Mr. Bowerman: Whistler buoy? [16]

(Testimony of Charles Wuori.)

A. Yes, sir.

Mr. Fulton: Q. Now, what was the condition of the tide at that time?

A. Just about a half ebb northwest started.

Q. How does the tide set?

A. The tide was set at the summertime westward.

Q. Westward? A. Yes.

Q. That is offshore?

A. Offshore north.

Mr. Bowerman: Has this been offered and received?

The Court: Admitted as Exhibit 1.

Mr. Bowerman: It has been offered and received?

Mr. Fulton: Yes, Mr. Bowerman.

Q. All right. Now proceed with the tow. As I understand it, you had the Melody under it. What was your position? Where was your towline made fast?

A. Made fast around the rudder stock.

Q. That is astern of the vessel?

A. Astern of the tug.

Q. All right. We will have Armand explain that. Now when you started the tow how was the Melody lying with reference to being submerged, or sunken condition, or what?

A. I think it was at least 45-degree angle listing on the portside. [17]

Q. To the portside?

A. Port or starboard, but I can't remember any

(Testimony of Charles Wuori.)

more which side it was. No; it was on the starboard side.

Q. In other words, it was listing to starboard approximately 45 degrees? A. Yes.

Q. And how was the bow—what position?

A. Well, we didn't see the bow. It was underneath the water.

Q. But you could see enough contour to make an estimate—to make an estimate of what sort of angle was downward?

A. Yes. The top of the pilothouse was below the water and during the war the U. S. Coast Guard required the name of the vessel painted under the top of the pilothouse so the airplanes could not spot us.

Q. All right. Then you undertook your tow. What happened to the position of the vessel as to its listing after you started to tow?

A. It straightened sideways.

Q. In other words——

A. She came back some.

Q. She came back? A. Yes, some.

Q. Did the bow raise any?

A. I could not say. I could not tell, but it seems to me the bow came up, too, some, but the stern came up quite a bit when [18] we started to towing.

Q. The stern came up? A. Yes.

Q. What is your opinion as to whether or not the vessel had settled any lower in the water from

(Testimony of Charles Wuori.)

the time you first saw her and you undertook your tow? What is your impression?

A. Well, I was afraid it would sink down before we got the line on. That is why I told Frank Hoglund we could not keep a receiver on any more, "I have got to get busy and get the line on before she is down entirely."

Q. In your opinion did she settle further in the water before you did that?

A. In my opinion it did.

Q. When you started the towing, Mr. Wuori, what course did you pursue or take? Did you set a course for any particular place?

A. Yes. I took—after that time I took the sounding and I set the course to North Whistler, mouth of Columbia, but the tide was setting us off continuously, and offshore, so after she had towed maybe three hours or so I changed the course, and then shortly afterwards I saw that light from North Whistler, and also the light from the lightship, but I can't remember now without taking the course out again to decide what course we were steering.

Q. You set a short course for what you thought was Whistler? [19] A. Yes.

Q. Please indicate on this chart here.

A. How.

Q. Would you please indicate on the chart here what course you attempted to set?

A. I have to have a ruler now.

Q. Mark it.

(Testimony of Charles Wuori.)

(Witness marks, with ruler, on Libelants' Exhibit 1.)

A. Oh, east southeast approximately.

Q. The course that you set was east southeast?

A. East southeast, yes.

Q. All right. Now indicate——

A. But later on we changed the course, but I could not tell just how much we were drifted. I think the time before we got the line on, I think we might have been here (indicating on Libelants' Exhibit 1.) I could not tell you exactly. And the tide was setting out, so we drifted out maybe a bigger circle than this one.

Q. All right. Take this pencil here and make a circle around this Whistler that you were setting your course for—Whistler buoy.

A. This one here (indicating).

Q. O. K. Now, you take your seat. That is not a circle. Now, Mr. Wuori, what was the next thing that happened? [20]

A. After we got the towline made fast Armand went down below, and the reason, in the wheelhouse they took the wheel and then I made another telephone call to the Coast Guard, and also at the C.R.P. cannery and they told me the crew was picked up but they didn't tell me how they were picked up.

Q. Did you at any time request assistance from the Coast Guard to help you with the tow?

A. Well, when I make the first call I asked the Coast Guard to send two boats out so we could get

(Testimony of Charles Wuori.)

that Melody in before she sinks entirely, and when they did arrive there they asked me what I wanted them to do, so I told them they could put the lines down and the sooner the better.

Q. What time did they arrive, or did they arrive? A. They did, yes.

Q. The Coast Guard? A. Yes.

Q. Approximately what time did they arrive? How long had you been under tow?

A. It seems to me we were towing her somewhere around two hours, more or less.

Q. And then the Coast Guard boats turned up?

A. Yes.

Q. Just explain to the Judge the type of vessels they were.

A. Well, the old Coast Guard type vessels. I think they are somewhere around forty feet long or so, but they are orphan [21] boats, surf breakers; that is, they go through the breakers. They don't sink.

Q. They are meant purely for lifesavers?

A. Yes, lifesaving boats.

Q. Are those the boats you refer to in the libel as surfboats?

A. Yes. A surfboat is a little bit different type of boat. It hasn't got no power. They might have but I haven't seen them.

Q. We refer to them as surfboats in the libel here. A. Yes.

Q. All right. What was the other type of boat that showed up?

(Testimony of Charles Wuori.)

A. Then there was a later type of boat. I don't know how old it is, maybe six or seven years old or so. It is powered with a Diesel engine; I don't know the horsepower; and it is approximately fifty feet long, but it has considerable more power than these gas boats—gasoline boats.

Q. All right. Which arrived first, the so-called single boat or open boat, or the heavier newer vessel?

A. The little one, surfboat or livesaving boat, came.

Q. What happened then?

A. Well, they started to put the line on the boat before that, and inquire about it of me, what I wanted them to do.

Q. All right. And they put the line on?

A. Yes.

Q. Then what happened? [22]

A. Well, when they got the line on they started towing.

Q. During the time they put the line on did you take the towing easy?

A. Yes. We slacked off once and they told us to keep all the strain on, what we possibly can, so they can work better. The Melody stayed more in the level, and I guess they were afraid it might sink if it slacked off.

Q. Then I understand another boat showed up?

A. Yes, shortly afterward the Triumph.

Q. The Triumph?

A. Triumph, or something like that—I don't

(Testimony of Charles Wuori.)

know how to pronounce that name—arrived, which was followed by the Diesel engine. It is about a 50-footer.

Q. I think we have alleged in here what that is. (Mr. Fulton refers to complaint.) Well, anyhow, that boat, the Triumph, made fast its line, and I assume then the three of you continued with the tug? A. Yes.

Q. Without ever stopping it, but the tow, the Melody was kept under way all the time in tow until you got back? A. Yes.

Q. Then what was the next thing that happened?

A. Well, there was three lifesaving boats for a fact, and I don't know when that Fort Canby boat arrived but there was two of them little ones standing by. [23]

Q. The other Coast Guard boat just stood by; is that right? A. Yes.

Q. Now, all this took place while you were in the ocean? A. Yes.

Q. That was before you changed your course to go into the Columbia? A. Yes.

Q. Just explain to the Judge what was done, when you changed your course out there, and so forth, and came into the Columbia?

A. Well, after we were just about abreast the jetties, perhaps a little bit in——

Q. Now wait a minute. You haven't got out there yet. You are out at sea. A. Yes.

Q. What course were you pursuing then? Were you still on that same course?

(Testimony of Charles Wuori.)

A. Well, shortly after the jetty light we saw the lights. All the lights were visible.

Q. Yes.

A. And so we don't give any attention to our courses or compass. We were steering by the lights —one light.

Q. I am thinking now about the Whistler buoy. When you got off the Whistler buoy, how far was that off of north jetty?

A. I don't know without measuring it.

Q. Just measure it and say about how far it was. That was where [24] you changed the course to come in the river, wasn't it?

A. Yes. (Witness measures on Libelants' Exhibit 1.)

Q. Well, I will get the other map. I will change my question. Get it off of North Head then—off of North Head. How far was Whistler off North Head?

A. About five and a half miles, approximately.

Q. About five miles. When you got to the Whistler buoy what did you do? In the approximate vicinity of the Whistler buoy what did you do with reference to coming into Columbia River?

A. Well, I can't remember we done anything. There were several ships coming in and out.

The Court: You might tell me, Mr. Fulton, what speed his boat ordinarily makes.

Mr. Fulton: Pardon?

The Court: What speed his boat ordinarily

(Testimony of Charles Wuori.)

makes without a tow, and what speed he was making with a tow?

Mr. Fulton: Very well. Did you hear the question the Judge asked you?

The Witness: Yes.

Mr. Fulton: Answer that.

A. Well, without the tow in the calm weather I have made a little over ten, what we consider nine and a half miles, nautical miles, but what speed we had when we had the tow on I could not tell. Tide and current was against us.

Q. All right. At some point when you got out there there was [25] a change of course to come into the Columbia River, wasn't there?

A. Yes, sir.

Q. You don't recall what that position was at the present time? A. No.

Q. Was it dark then?

A. Oh, yes; a way after daylight. I think the sunset was somewhere around, oh, maybe nine o'clock or so.

Q. It was after that—dark? A. Yes.

Q. You were operating then by the dimmer light? A. By the light, yes.

Q. All right. Then tell what happened?

A. When we got about abreast of the jetties some place, then I talked through the telephone.

Q. The west or east end of the jetties?

A. Well, just about abreast of the jetties.

Q. I mean, the west end of the jetty, at the sea end of the jetty or the shore end?

Mr. Wuori: Charles Wuori.

A. Yes, yes; the outside end.

Q. The outside end? A. Yes.

Q. The west end? A. The west end, yes.

Q. Of both jetties? [26]

A. Just about the same length.

Q. You were on a line running from about the north jetty to the south jetty?

A. Yes, just about.

Q. What happened then?

A. We had quite long tow lines out and there are quite a few navigation aids in the channel.

Q. How long was your towline?

A. Well, I could not tell exactly but it seems to me we had about a hundred fathoms.

Q. One hundred fathoms? A. Yes.

Q. O. K. Then what happened?

A. I talked through the telephone to the skipper on the Triumph and I told him about it, "We have got to shorten our tow lines when we get in the channel or else we get fouled."

Q. What navigation aids were there?

A. Yes; so many buoys and channels, and mine zoning was still there, too. So then we started to shortening our towlines. The Triumph went from starboard to port. We were still going ahead continuously running.

Q. Where were you at that time? Were you in the pilothouse? A. I was in the pilothouse.

Q. Were you at the wheel?

A. I can't remember where I was. Yes, I was on the wheel. [27] I was alone there at the time

(Testimony of Charles Wuori.)

when I made the telephone call. The boys were asleep.

Q. And from the time you made the telephone call to the Triumph on the question that the tow-lines be shortened—— A. Yes.

Q. ——up until the time you were going to remain there about the fouling of your wheel, had you in any manner changed your vessel's course?

A. No.

Q. Or did you stay on the same course?

A. Stayed on the same course.

Q. Go ahead and tell the Judge what you meant by the Triumph going from starboard to port.

A. When we were shortening our tow line the Triumph went from starboard to portside until that time one of the boats was on the port and the other one on the starboard and the Triumph was on the right-hand side of——

Q. Of you? A. Yes, of the Stampede.

Q. Your boat was in the middle?

A. The middle, yes. Then she went from right to left. The towline fouled in our propeller.

Q. What happened then?

A. Well, we cut the towline—well, I have got to explain a little bit more. I think we cut the foul on the Triumph's [28] towline, oh, about twenty-five to forty fathoms from the Melody. Then we cut the line off between the Stampede and Triumph first, and then cut the line which was between the Melody and the Stampede and han-

(Testimony of Charles Wuori.)

dled that in back to Triumph again. There was still two boats towing the Melody.

Q. What was the condition of the tide at that time?

A. The tide was flooding, coming in, coming in the Columbia, and after the Triumph got the towline fixed again, then called up that boy on Disappointment, Cape Disappointment Life Boat, and they give us a towline while I went down in the engine room to clear the wheel. The engine was running continuously. That is on the Stampede.

Q. Did you succeed in clearing the wheel?

A. Not exactly all, but the wheel was clear. That is, I was able to throw the clutch on and off, but I was a little bit afraid if I had to keep the wheel on it might burn the bearings off, the stern bearings off.

Q. What was your intention if it became necessary to resume the tow?

A. Well, to use the wheel as if nothing had happened.

Q. Yes. What did your subsequent investigation of the conditions show—it would have injured the wheel or it would be safe to continue the tow?

A. It would be safe. You mean after you reach the tow?

Q. Yes. It would have been all right if you had? [29] A. Yes.

Q. It would not have hurt your boat?

A. No.

(Testimony of Charles Wuori.)

Q. It would have operated as it did before?

A. Yes.

Q. All right. Then what?

A. Well, we never did run on our own power after we got inside. The Coast Guard boat took us in then and we arrived there about the same time; maybe we got a little bit ahead of the Melody.

Q. Did you stand by with your vessel?

A. Until we were at No. 14, I guess, channel buoy.

Q. Everything was progressing satisfactorily with the tow? A. Yes.

Q. Then you stood by the tow until it got into, you say, No. 4? A. 14.

Q. 14; and everything was absolutely safe with the tow? A. Yes. We were entirely inside.

Q. Yes. All danger was passed?

A. Yes. We were inside at the first place when we fouled our wheel.

Q. State the facts as to whether, after you got the tow into the Columbia River to a point that your wheel was foul, about all that was necessary was to keep a slight astern?

A. Yes. The tide was carrying it in, yes. [30]

Q. Then what happened after that? After you got in where did you go?

A. We beached the boat and at the time before we beached it, shortly after we fouled our wheel I took the Triumph again and I asked what is his opinion about it, beaching the boat at the Point

(Testimony of Charles Wuori.)
Adams, which is the same locality where the life-saving station is located and the lifeboats.

Q. Right out in front of you?

A. Yes. And he said, "The beach is pretty good there." I told him, "We have got to beach both of them, the Melody and the Stampede," in order to get satisfaction. There were some knots left in the wheel. We had to beach the Stampede, too.

Q. O. K. And you beached both of them?

A. Yes.

Q. In your opinion what was the time that your wheel became fouled approximately?

A. I can't remember.

Q. You can't tell? A. No.

Q. How long after your wheel was fouled did you release the tow? Was the Melody beached at the Coast Guard station? How long an interval of time elapsed in that; a couple of hours?

A. No, I don't think so. Less than an hour, it seems to me, but I could not tell.

Q. Less than an hour? [31]

A. Yes, sir; but I am not sure of that.

Q. All right, Mr. Wuori. Then what happened? Then what did you do after that?

A. There was nothing we could do that night, until next morning.

Q. Then what did you do next morning?

A. Next morning I went over to the Coast Guard station again and inquired about if they got any gasoline or power pumps.

(Testimony of Charles Wuori.)

Q. All right. What time of the morning was that? A. That was right after daylight.

Q. Right after daylight?

A. I think about five o'clock or so.

Q. What did they tell you?

A. They say they have.

Q. All right. What did you do?

A. Well, I asked him about if they going to let us use their pump to get that Melody pump out. Oh, it was—I don't know just what time it was; maybe six o'clock or so; but the water was low enough to get on board the Melody with the hip boots on. Maybe it was later. I wouldn't know. But anyhow that worked. We got the pumps and the hoses and everything ready there right at the water's edge, so at the time when we were able to start pumping we stretched the hoses in the hold, I mean in the forecastle, and pumped her out.

Q. You say "we." Who do you mean by "we"?

A. The whole crew of the Stampede, and there was, I don't know how many Coast Guard members there was; maybe five or six.

Q. How long did you work on it?

A. I don't know. If you start to considering from daylight when you got off of the Stampede, then by the time when it was pumped out, I don't know just how long it was. We never keep track of the time, just so the work is done.

Q. Well, was it ten minutes or fifteen minutes?

A. No. It took—it seems to me it took four or five hours.

(Testimony of Charles Wuori.)

Q. All right. And you finally got the water out of it? A. Yes.

Q. Then what did you do? What did you do then with reference to the Melody? What was done next with reference to the Melody? The tide came in?

A. Well, when the tide came in I asked the Coast Guard to tow her in, which they did.

Q. Where?

A. They towed us in at the C.R.P. cannery, the company where I have been fishing for a number of years.

Q. Were there any fish aboard the Melody?

A. Yes, there was some. I thought there might have been, oh, eight or nine thousand, but I would not know how much there was. There were several pens still full, and then some pens had fallen off and the fish were found in the middle of the boat out from the pens. [33]

Q. Mr. Wuori, in the answer of the defendants —the respondents—they state they started to fishing on the 22nd, that is two days before you found her. Now taking into consideration the bent on the tuna fishing benches, what in your opinion amount of ice did they have in their hold?

A. When you say tuna fishing with a lifeboat, my boat is only twenty-one tons and the Melody is twenty-five. We take, oh, around five or six tons of ice with us every trip when I went out.

Q. For that size of boat five or six tons is the normal amount of ice to carry?

(Testimony of Charles Wuori.)

A. Yes, that is what I think.

Q. After two days at sea, though—they went on the 22nd—how much ice would they have?

A. Well, if they took six tons I don't know how heavy the ice was but it always melts more or less.

Q. How much would they have left in there, though?

A. I could not say.

Q. What is your judgment as to how much they would have?

A. First, I have to know how much fish they had and how long they aimed to stay out, and so forth. You have got to take all those things into consideration.

Q. All right. Just your estimate.

Mr. Wood: If. your Honor please, when the witness has said from the conditions he can't state it and can't estimate [34] without knowing those factors, I don't think counsel can press him further. He says he doesn't know and can't even estimate.

The Court: All right.

Mr. Fulton: He gave me a figure here of four tons when I drew this libel.

The Witness: They must have had—well, in the first place, if you know how much ice they took, I suppose they took five tons and they were out a second day and had some fish, evidently they had used a thousand pounds out of it.

Q. Well, they admit the value of the fish was around $1400. Would that mean anything to you?

(Testimony of Charles Wuori.)

A. Yes, one way or another. I don't know if they got the full price.

Q. Yes, they got the full price.

A. If they were No. 1 fish or No. 2, and so forth, well, the tuna amounted to $400 a ton at that time.

Q. Approximately?

A. Yes; so they might use a thousand pounds of ice.

Q. Then in your opinion how much ice would they normally have in the hold?

The Court: I will subtract one from five.

Mr. Fulton: All right.

Q. Now getting back to the Melody, after you pumped out did you make an examination of her?

A. Outside? [35]

Q. And inside. A. Yes, I did.

Q. What was the condition of the Melody, so far as damage was concerned?

A. I could not see any damage on it whatsoever. All the woodwork and finish was just like new when the boat came out of the shipyard, except one panel off an inside door was broken.

Q. Did you happen to chance to observe the tanks as to how much oil she might have been carrying? A. No.

Q. Fuel oil?

A. I haven't an idea, but a tank of that size would carry at least a thousand gallons.

Q. A thousand gallons? A. At the least.

Q. And speaking of the voyage of this boat,

(Testimony of Charles Wuori.)

what, in your opinion, was holding her up? What is your best judgment?

A. From my opinion, it was ice and oil and air, what might have been in the pockets here and there.

Q. It is your opinion she would have sunk very quickly. A. Yes.

Q. It is? A. Yes.

Q. All right. After you made this examination what in your opinion is the value of that vessel?

A. Well, I don't know.

Q. What in your opinion was the value of the vessel before the accident and the value after?

A. Well, the new boats at that time of that size cost somewhere around thirty-five thousand dollars, new boats.

Q. This was a new boat, was it?

A. Yes, it seems to me brand new, but afterwards I found out it was her maiden voyage.

Q. Her maiden voyage? A. Yes.

Q. And what was she worth after that? Give the figure and explain.

A. Well, I don't know just exactly what had to be done but in general overhauling I think it cost about a thousand dollars most. I would allow about three thousand dollars to put her in the same shape as it was before she sailed out; that is, not any improvements made but in the same shape as it was.

Q. Now you are taking into consideration her electrical equipment, radio, telephone?

(Testimony of Charles Wuori.)

A. Yes.

Q. Direction finders? A. Yes.

Q. She had that equipment, of course?

A. I think she had Intervox 2-way radio.

Q. Didn't have direction finders? [37]

A. It is a combination, if I am not badly mistaken.

Q. Well, could that get sea water in it, or do you know? A. I don't know.

Q. In your opinion what is one of those worth?

A. If it was 25 watt set I think they sell somewhere around between six hundred and seven hundred dollars.

Q. New?

A. Yes. But if it was higher voltage, then the price would have raised, too.

Q. All right. Now, Mr. Wuori, I would like to have you pursue another subject here. Now that is as to hazards and dangers in connection with that tow——

The Court: I guess we will stop now and resume at two o'clock, Mr. Fulton.

(Thereupon, at 11:59 o'clock A.M., a recess was taken until 2:00 o'clock P.M. of this day, Monday, October 29, 1945, at which time court reconvened and the following further proceedings were had:)

CHARLES WUORI,

one of the libelants, resumed the witness stand and further testified as follows:

Direct Examination (Continued)

Mr. Fulton: Your Honor, by agreement of counsel, we are introducing a chart of the mouth of the Columbia River showing [38] the jetties. I will ask that it be marked Libelants' Exhibit 2.

The Court: It may be marked an exhibit.

(The chart so offered, entitled "Columbia River Pacific Ocean to Harrington Point," etc., was thereupon marked Libelants' Exhibit 2.)

Mr. Fulton: Q. Now, Mr. Wuori, would you step down here, and I call your attention to Libelants' Exhibit No. 2, which is a chart of the mouth of the Columbia River, showing the north and south jetties, speaking of the fouling of the wheel of your vessel, the Stampede. I wish you would indicate on this chart where, in your opinion, was your position at the time this fouling took place. Please mark it with a pencil.

Mr. Bowerman: Would it be well to put a figure in the circle?

Mr. Fulton: What?

Mr. Bowerman: You have got a couple of circles there already.

Mr. Fulton: Not on this chart.

Mr. Bowerman: I see.

Mr. Fulton: I introduced a new chart, Mr. Bowerman, when you were gone.

Mr. Bowerman: O. K.

(Testimony of Charles Wuori.)

The Witness: Somewhere around that neighborhood. (Witness marks on chart.)

Mr. Fulton: Q. All right. Before taking up and discussing the hazards of the tow, there are a couple of other instances, Mr. Wuori, I want to straighten out here, at Mr. Bowerman's [39] suggestion. I would like to have you explain in detail, in your own way, how this fouling of your propellor took place. Just explain so the Court can understand it.

A. Well, after I had made the telephone conversation with the skipper on the Triumph and told him we had better shorten our towlines before we get in the inside channel—of course, there is not much distance in the places where we had to go through, especially, the channel was pretty narrow, so we slowed down and started to take in our towlines.

Q. All right. That is the part I want you to explain. Why did you take in your towlines, and what was the purpose of slowing down?

A. Well, we got mechanical winches.

Q. Power winches? A. Power winches.

Q. With reels in the line?

A. Yes. We have practically got two towlines, 300-fathom apiece, half-inch cables. When we are fishing we have got four of those cables on.

The Court: What kind of cables were they?

A. They are half-inch plow steel cables. But we had only one hooked on the Melody, one on the portside; that is on the left side of the vessel.

(Testimony of Charles Wuori.)

Mr. Fulton: May I ask a leading question here?

Q. Was it your purpose to slow down just sufficient, to a [40] speed sufficient to reel this line in without any particular pull on it? A. Yes.

Q. Was that the purpose? A. Yes.

Q. All right. Now where were you at the time?

A. I was at the wheel.

Q. Who was at the winches, if anybody?

A. John Kurtti was at the winches, and then once in a while I came out on the main deck, too. There wasn't anybody on the wheel at the times, but I got mechanical steering apparatus.

Q. Just explain that to the Court here, mechanical steering apparatus.

A. Well, it is mechanical steering apparatus. You set the course and it stay on the course any length of time without anybody being watching the wheel.

Q. Is it accurate? A. Yes.

Q. How does it compare with the manual operation?

A. It is more accurate than any human being can operate the wheel.

Q. After you started to pick up, or to reel in your line, your towline—— A. Yes.

Q. ——was there any change in your course?

A. No, there wasn't any.

Q. All right. Then what happened? Just explain what happened. Oh, well, pardon me. Just one more question. Prior to this time the Melody.

(Testimony of Charles Wuori.)

as I understand it, was being towed by three vessels? A. Yes.

Q. Just explain to the Court the position of those vessels, and the position of each, and how the tow was being made.

A. Well, the Stampede was in the middle, then the Triumph was on the right, and the smaller lifeboat was on the left-hand side, and we were——

Q. When you were in the river, or how?

A. Yes.

Q. Make it north or south, so we won't have any trouble.

The Court: Excuse me a minute. I have to answer a telephone call.

(A short pause was here had.)

Q. Mr. Wuori, when you were proceeding with the Melody into the river, approximately what direction were you going?

A. You mean in the river?

Q. Coming into it, yes.

A. In the river. Of course this without the tow is practically north northeast, if I am not mistaken, and when we got the tow on we got to take consideration the tide and the current. Whichever way it takes us we have got to correct our courses. [42] The course in the channel doesn't mean hardly anything, but it is easterly direction.

Q. I know, but simply for the purpose of explaining, it is fair to say you are running in generally an easterly direction coming in?

A. Yes, easterly.

(Testimony of Charles Wuori.)

Q. What vessel was on the north of you?

A. Well, what we call a surfboat vessel on our south, or north side.

Q. On your north side, and on the south side was the Triumph?

A. The Triumph was on the south side or starboard.

Q. Was your boat, the Stampede, advanced—have out a longer cable?

A. Yes, we had a longer cable leading.

Q. You set the course and they followed, did you? A. It followed us.

Q. That is the procedure you had perfected during that time from the beginning?

A. From the very beginning of it.

Q. Now explain what happened. You said you were shortening your towline? A. Yes.

Q. What is the next thing that developed?

A. At the time when we were shortening our towline the Triumph drifted from south to north side of us, and by doing so we got [43] her towline in our wheel. If we were alone nothing like that would have ever happened; we would have brought the boat in by ourselves alone; but I thought for the purpose we would save life and property, and that is why I required their aid.

Q. Anyway, that is what happened. It crossed your bow? A. Yes.

Q. Now what kind of a predicament did that put you in. Were you in any danger there?

A. Yes, on the way we were, and we had kind

(Testimony of Charles Wuori.)

of a hard time that night, especially in the pitch dark there. Well, first, what we done, we cut the towline which was between the Stampede and Triumph.

Mr. Fulton: Your Honor, can you hear him all right?

The Court: Yes.

A. And they took their line in; that is, what was left. We were approximately, I don't know just how long but I would say twenty-five to forty fathoms from the Melody at that time. Then we fished that line up.

Q. Then what did you do with it?

A. We had to take the spike pole and finally managed to get the bight of the line, of that towline. The spike pole——

The Court: I thought he was wrong about the spike a while ago. He said spike both times.

The Witness: Spike. Spike.

Mr. Fulton: Q. Then what happened? [44]

A. Then we cut that line close to our propeller and hang onto that line until the Triumph came close enough to us to throw the line back to them.

Q. Oh, I see. Then you bound those lines together? A. No. They did.

Q. They did?

A. Yes. Like I said, we had twenty-five to forty fathoms.

Q. What kind of lines were aboard the Triumph? A. I think it was four reams.

Q. Manila or steel?

(Testimony of Charles Wuori.)

A. Manila. Around four reams. That is, three times four is about twelve inch round.

Q. Now as I understand it, you cut the towline attached to the Triumph and——

A. Yes.

Q. ——you cut it between your vessel and the Triumph, and between your vessel and the tow or the Melody? A. Yes.

Q. Then you waited there, and the Triumph came up and they took both those ends?

A. They took the line which was between the Triumph and Melody in first in order to have a clear wheel so they were able to reverse and go ahead. If they hadn't done it they would foul their wheel, too.

Q. Then they went down to the Melody, which was cut off? [45] A. Yes.

Q. And then proceeded to tie them together?

A. Yes.

Q. Or, as you gentlemen call it, bind them?

A. Yes.

Q. Then what were you doing all of this time?

A. We were twisting in with the flotilla then, when they cut the line to clear up this standby surfboat.

Q. What was your position with reference to the tow then?

A. We were still east from it.

Q. You were in no particular danger of that, I take it?

A. No, not exactly, but it could have drifted

(Testimony of Charles Wuori.)

over on us. There is more or less always swells in a bar if they bump together, heavy drift like that, like the Melody, was waterlogged, or practically the same.

Q. It was a hazard?

A. Yes. And if it had happened before we were in the jetties there would be more danger, because even if a tide is flooding, but outside the jetties, it is still setting a northerly and westerly direction regardless of tide.

Q. And what position does that drift—what hazard does it create?

A. It would have drifted us on the Peacock Spit, or on the jetties at the north jetty.

Q. Then you had got out of the most hazardous grounds when this [46] happened?

A. Yes. Like I said, we were inside, and when you are inside the jetties then the tide is only going two directions, in or out, but once you get inside it always sets certain times of the year south 30 and north 30.

Q. All right. Now I want to ask you, was your wheel tight so it could not be turned?

A. After we cut the towline from that surfboat, then I went down in the engine room and worked on the clutch and I was able to turn the wheel.

Q. Freely?

A. That is, it was turning freely, yes.

Q. And why didn't you drive in the tow then?

A. Well, it is not good policy. When you have got your wheel fouled, in the first place, you don't

(Testimony of Charles Wuori.)

know what is taking place there. You haven't got a chance to see it. And we would have used on our own power if we were alone and there wasn't any reason in the world to try to get in when there was a third boat standing by without doing anything.

Q. In other words, you considered, in your opinion, it good seamanship to take the tow or stand by? A. Yes.

Q. Had you made up your mind that your assistance would be needed?

A. If it was needed we were able. [47]

Q. You were able?

A. Yes. Our engine was running continuously, but then we had to propel around.

Mr. Fulton: Did you have anything else, Mr. Bowerman, along that particular line? Your Honor, do you have any objections to the members of the crew sitting up here, so they can hear this, or is that a violation of the court rule?

The Court: No. Why do they need to hear it?

Mr. Fulton: I don't know that they do. They don't have to hear it, of course.

Mr. Wood: Why should they hear it at all?

Mr. Fulton: Q. Now getting back—I am going to clear up a couple of other things—getting back to the Melody at the time you arrived out there, Mr. Bowerman doesn't think you explained it quite sufficiently so that the Court got a true picture as to its position in the water and about the assertions that you made, the assertions of the crew,

(Testimony of Charles Wuori.)

as to visibility. I wish you would just generally tell the court about that.

A. The visibility was what we considered clear weather but more or less, if you get any distance from the land, it seems like there is a fog banner or haze hanging at the water's edge and a little bit higher up, so you can't just exactly tell where you are, and that is the reason I took the sounding the very first thing when we were ready to proceed with our towing.

Q. Now making your search it developed there, I understand, [48] that the crew of the Melody took off in the life raft. Did you see that life raft?

A. No.

Q. Did you make any effort to find it?

A. Well, we made circles; I think we made at least two circles looking for them. I was expecting to see the crew on the life preservers. I don't know how I got that in my mind, but when we didn't see anything there at all, and, like I said, it was clear weather; the visibility was fairly good; but life rafts and things like that when they don't float high, you can't see them very far—not miles, except if you happen to look in the direction when they are on top of the swells.

Q. In that connection, too, what would you estimate the height of those ground swells at that time?

A. I don't know. In my life I never estimated any swells at any time.

Q. You can't tell, huh?

A. No, except when we were coming over the

(Testimony of Charles Wuori.)

bar if they are too high on two sides then we turn back in. I don't attempt to cross.

Q. In other words, you are not able to estimate the height of the swell? A. No.

Q. But they were sufficient you feel to hide this life raft from you? [49] A. Oh, yes.

Q. For a couple of miles? A. Yes.

Q. Now tell how the Melody was lying in the water, in detail.

A. Well, when we made the circles, when we were looking around for survivors, and we looked around for any boats or any vessel visible in the horizon, but there wasn't I think a vessel in the whole horizon in that clear weather, and the Melody was laying, I think it was with at least a 45-degree list on her starboard side and the bow, the forward part or front part of the boat was entirely under the water and just by the top of the pilothouse.

Q. That would be the portside of the pilothouse?

A. Yes.

Q. How much of the portside of the pilothouse was visible?

A. The canvas was all on top of the water.

Q. Just explain that now, the canvas. That is on top of the pilothouse?

A. On the top of the pilothouse.

Q. Explain that to the Judge, just what that canvas is you have reference to.

A. Ordinarily they put the canvas on top of the

(Testimony of Charles Wuori.)

pilothouse not to permit water getting in. That is the roof—roofing.

Q. That is the roof? A. Yes. [50]

Q. That was out of water?

A. That was all out of water.

Q. On the whole top of the pilothouse?

A. I think it was whole top of the pilothouse.

Q. How high would the highest point of the pilothouse be out of water?

A. From the main deck I think it was somewhere around seven—about seven and a half feet, I think.

Q. Seven and a half feet?

A. From the main deck.

Q. To the pilothouse?

A. On the top of the pilothouse, yes.

Q. Was that all above water?

A. The very top, just so that the canvas was visible. The roof was visible.

Q. What was the top deck? Any of that above water?

A. There wasn't anything on top of the water, like I said, except the top of the pilothouse and a part of the bait tanks.

Q. How much of the bait tanks was above water? What proportion? Then I will ask you the size of them.

A. It seems to me that the forward bait tank. I can't just remember about that. On the one side it might have been one-fourth or less.

Q. What is the approximate size of the bait

(Testimony of Charles Wuori.)

tanks, to give the Court an idea, and where they are located? [51]

A. Well, first, from the pilothouse it is always hatch cargo, where you put your fish cargo on ice; then next to the hatch is the bait tank, or tanks. If I am not mistaken this particular Melody had two bait tanks on it.

Q. The approximate size of them?

A. I think they were somewhere around eight feet in their width I didn't measure them.

Q. I know, but just give the general size.

A. No. About eight feet in width, and it seems to me they were higher than ordinary tanks. I think they were about four feet higher.

Q. How long?

A. Between five and six feet, I guess.

Q. They had two of them? A. Yes.

Q. Were they lengthwise of the hull or crossways of the hull, the two of them?

A. Well, eight feet—eight feet wide. That means across the forward.

Q. Across the forward? A. Yes.

Q. All right. How much space was left of the Melody at the bait tanks and the bulwarks?

A. I can't remember that. I can't remember even if the aft bait tank was aft of the poop tank or all were on the main [52] tank.

Q. Anyhow, a part of the aft bait tank was above water? A. The upper part.

Q. The upper part?

A. Yes; and on the portside more.

(Testimony of Charles Wuori.)

Q. Excuse me just a minute. Was there any part of the deck that wasn't afloat with water?

A. There was a little part of the poop deck afloat; very little; I should say about two or three feet fore and aft, and maybe a little bit longer crossways.

Q. Did this vessel have a cabin besides the pilothouse? Did it have any cabin on it besides the pilothouse?

A. No. It is all interior. The forecastle and the sleeping quarters were in the forward part under the main deck.

Q. Was there any cabin after the pilothouse?

A. Visible?

Q. No. On the boat as constructed was there a cabin after the pilothouse?

A. Well, we considered that whole housing as a pilothouse. There is galleys, and so forth, built on it.

Q. I know, but——

A. No. It is the only house on it.

Q. Just one house?

A. One house, yes.

Q. That is the pilothouse? A. Yes. [53]

Q. Was the whole house built up the same height as the pilothouse? A. Yes.

Q. All the way along? A. Yes.

Q. Naturally the bilge and the hold of the ship and everything was full of water?

A. Yes. There was only a small portion of the poop deck. The poop deck, I don't know how

(Testimony of Charles Wuori.)

long and how high it is on this particular vessel, but ordinarily they are about a foot from the main deck higher. That was also under water, except the small portion between the swells which came up once in a while and it seems to me that the swells went over.

Q. All right. We have got that. Now we are getting back to the Melody. I think you think I didn't ask you what the value of the Melody was prior to this accident. What in your opinion was the value of the Melody prior to the accident?

A. Including all equipment, what she had on it?

Q. Well, you divide it any way you want to.

A. I should say the valuation, including all the equipments she had on, was somewhere around thirty-nine thousands.

Q. All right. Segregate these values.

A. The hulls, it is around thirty-five; then the bait tanks, pumps and the nets. From my own experience, from the time I had them things on it cost me pretty close to four thousand [54] dollars, between three and four thousands.

Q. Then you say prior to this accident she was worth in the neighborhood of thirty-nine thousand dollars, with equipment as she was?

A. With her equipment, yes.

Q. What in your opinion was the value of the vessel afterwards?

A. Well, three thousand dollars less.

Q. You think it was worth three thousand dollars less. Oh, yes, one other thing. Did at any

(Testimony of Charles Wuori.)

time any members of the Melody crew, or its skipper, offer you any assistance even after you had beached the vessel?

A. Not at any time.

Q. Did they make an offer of assistance, or did they lend assistance to help you get the water out of the hold, or to close it? A. No.

Q. Now just on the question of fish, what examination did you make of the fish and what did you do toward preserving them and preserving all equipment about the boat?

A. Well, we took—we pumped the water out of it, the first thing, and when it floated we asked the Coast Guard to get it in and get all fish out of the hold as soon as possible, and while we were unloading there in the cannery, before all of the fish were off, then the skipper came along and he took the boat. I don't know where he took it. [55]

Q. I don't mean that, but didn't you make some investigation before you moved the vessels off the sands for disposing of the fish, to get them disposed of before they spoiled? Tell the Judge about that. I have reference to Point Adams.

A. Yes. When we pumped the boat out first, I think first, we thought it was the best way to get the fish out of there as soon as possible before we were able to float the boat, so I sent two of my crew members over to Point Adams to get a big skiff, seining skiff.

Q. Where?

A. Point Adams. It is only a short distance; I should say about a quarter of a mile, or less.

(Testimony of Charles Wuori.)

Q. Quarter of a mile?

A. Or less from the place where we beached the boat. So the boys went over to work on that skiff, but in the meantime I think it is useless work. It is only a matter of a few hours before it will refloat the whole thing, and I thought it takes pretty near just as long for us to get fish out of the hold, if we start to unloading there, as it would have taken for the time we started floating it.

Q. It would take more handling?

A. Yes, and more handling of the fish. It is no good for fish to be handled so many times; especially I was afraid the fish might be soft already, when they have been in the water so long.

Q. Then did you make any effort to do anything about preserving [56] machinery, or equipment, or anything else?

A. Well, I called up Astoria to see if they had a machinist, and this particular company that handles the make of engine the Melody had in it, in the case if they don't show up at all; that is, the skipper of the Melody; and they were ready there waiting for us.

Q. That is, the mechanics? A. Yes.

Q. Was it necessary in your opinion to immediately do work on the engine? A. Yes.

Q. Just explain to the Court why.

A. Well, the sooner you get to work and the salt water out of the machinery and batteries, more or less, the better, since the things have to spoil, and the salt water should be taken out right away

(Testimony of Charles Wuori.)
and then washed out. The same thing for machinery. If it stay in salt water any length of time it forms the rust and spoils.

Q. In other words, did you, in your opinion, take every precaution to preserve this property, and fish, and cargo, and equipment? A. I did.

Q. What about these nets and the lines, and so forth? What did you save of the nets?

A. Well, I didn't do anything like that. The time we got the [57] fish unloaded, then we can take the net out and wash the net and try them out.

Q. But the net was saved?

A. The net was saved.

Q. Was the bait tank saved? A. Yes.

Q. Was any equipment lost, that you know of?

A. I don't think so. I don't think any equipment was lost. Some dishes might have been broken.

Q. Dishes? A. Yes.

Q. And one panel of the door. Now, Mr. Wuori, I would like to have you explain to the Court the hazard to both life, your vessel and to your crew, in undertaking the salvage and the tow of that vessel from the position where you found her into the Columbia River, where she was ultimately beached and saved. Just in your own words start right from the first. Tell the first that happened to her, about Mr. Syvanen boarding the vessel, fouling your wheel on the net.

A. Well, in the first place, when you go into a

(Testimony of Charles Wuori.)

submersible, oh, like the Melody was, you don't know what is floating and what is not floating, and any time you go close to those things you might get your net fouled.

Q. Your wheel?

A. Yes, your wheel fouled. Then you might be bumping into [58] each other until you are in the same shape as the one which you try to salvage. And then, boarding on the Melody, I know for myself I would not have boarded her, on the Melody.

Q. Why not?

A. Well, there is always a tendency to get hurt boarding such a thing as that, when the seas are always rolling. It is a different thing if you can board such a thing in the bay in the calm water. But Armand voluntarily offered to go there, so I didn't have any objections to that.

Q. You discussed the hazards with him?

A. Yes.

Q. Now while he was out there was he visible to you all the time? A. No.

Q. What caused you to lose sight of him?

A. Well, every time when he tried to—there is a cockpit with its opening in the stern of the boat. I don't know how—maybe it is two feet in the width and, oh, maybe in the lengthways eight; maybe two feet crossways and eight feet lengthways. At least two-thirds or more were in the water.

Q. Under the water?

A. Underneath the water. There was only a

(Testimony of Charles Wuori.)

small opening on the one side, and then when he was trying to get the line around the rudder stock, which was entirely in the water, he had to get on it way down, so I was afraid if the boat sinks [59] the time when he is underneath he will go down with it and get tangled up or something. You never know what is there when you don't see it. There might have been lines or something he could foul himself, and so forth.

Q. That is a real hazard?

A. Well, from my opinion, yes.

Q. Was there any particular hazard if you had fouled your wheel out there, or something, and the boat, the Melody, had sunk when you first undertook the tow when you were there all alone, was there a hazard about that?

A. No. No, not exactly, until we got in the channel when we got our wheel fouled. We were not in trouble until we got in the middle of the Columbia River, where we fouled our wheel.

Q. All right. After you undertook the tow and had the Melody under way, where was the next position of the tow that you were presented with a hazard? In other words, when you were towing along there out in the ocean, you say there wasn't any particular hazard?

A. No, no, there wasn't.

Q. Where was the next hazard as to life and as to danger to your vessel, danger to your lives, and so forth?

(Testimony of Charles Wuori.)

A. Once we got in the channel, the channel is a place that is so narrow.

Q. Can you point out on either exhibit, Libelants' Exhibit 1 or 2, those positions of hazards, and explain to the Court. [60] Will you do that?

A. Even if we didn't get our line fouled up when we were towing a sunken object like that, we don't always have the steerage. You see, the current and the tide set us off, more or less, and especially at the night, and there is quite a sharp turning point where the mine zoning is.

Q. Explain that. What do you mean by mines?

A. Well, through the mines there was a mining zone laid across the channel there.

Q. Do you know where they were?

A. Yes. They were a little above Number 14.

Q. Were you careful? Did those present a danger, do you think? A. Yes.

Q. Have you been so advised by the Government? Had you been advised by the Government?

A. Well, any man who has been running in the river would see them floating first. I don't know how heavy they are but they are still quite heavy and no lights of any kinds on them. If you hit one of them with wooden built hulls, I think it runs holes right through, and no lights on them.

Q. No lights on them?

A. No lights on them.

Q. How was this, a moonlight night, or dark, or how was it?

(Testimony of Charles Wuori.)

A. I can't recall, but it was a clear night. Lights were visible. It was fairly good. [61]

Q. Over approximately what area there were these mines located that presented a particular hazard?

A. Through Number 14, and they are laid out in this position (indicating).

Q. Would you mind pointing to Libelants' Exhibit 2? Take a pencil and indicate by drawing a line the mine field that presented a hazard to you and your tow. When I say you, I mean your vessel and your crew and yourself.

A. Something like this; if I am not badly mistaken, they are something like this postion here. I am not quite certain but approximately somewhere around this.

Q. Now wait a minute. Are you getting that? I know the Judge is not getting it. All right, Mr. Wuori, you are indicating here with a series of x's on Libelants' Exhibit No. 2, where, in your opinion, this mine field is located?

Mr. Wood: I object to that question. What he said was, he is not sure about it; he is not at all sure about it. The best he can estimate it, it is there, but he doesn't know.

A. Yes, but we have got to go through this mine zone before we get on this side.

Mr. Wood: I heard you say you could not mark it very accurately, where it is; you just think it is somewhere around there.

(Testimony of Charles Wuori.)

Mr. Fulton: Well, that is all right. That is all of that.

The Witness: Yes, right there. [62]

Q. That is approximately it, is it?

A. Yes.

Q. How far is Buoy 14 from a line drawn——

A. 14 is in the turning point. That is, we sent our boys over there when we entered the river.

Q. Will you please indicate 14, then.

Mr. Wood: It is already marked 14 on the chart.

Mr. Fulton: I know, but we want it here marked and 14 right alongside of it with big figures so you can see the thing.

(Witness marks on Exhibit.)

A. This is Number 14.

Q. You have got only 4 here.

A. That is Number 14. Then you run five minutes full speed east by north from Number 14. Then you come into this bank and then shortly after you have passed this bank the mine zone is located, so it can't be very far out.

Q. O.K. How far is it from the mine to a line drawn at the west end of this?

A. I never measured it.

Q. Can you measure it here now? Can you tell with this? Are you familiar with this map?

A. Nautical miles—thirteen miles. (Witness figuring with map.) Three and three-quarter miles.

Q. Three and three-quarters miles?

(Testimony of Charles Wuori.)

A. Three and three-quarter, or three and a half, something like [63] that.

Q. Mr. Bowerman calls my attention to the fact that you said you called for arrangements for a machinist and mechanics to be up there to take care of the engine? A. Yes.

Q. Who was that, do you know?

A. It is Atlas Imperial Engine Company.

Q. Mr. Walker, was it?

A. Mr. Walker. I cannot remember his first name. They handle also this—I think it was Mack —Mack Diesel engines.

Q. Was it a Mack Diesel engine in Mr. Rustad's boat? A. If I am not mistaken it was.

Q. In any event, Mr. Walker was the agent for that engine? A. Yes, he was.

Q. And he was at the dock ready for you when you got there? A. Yes.

Q. And the only reason he didn't go to work was because the captain would not let him; is that right?

A. Yes.

Q. Captain Rustad would not let him. In your opinion would it have been the proper practice to have immediately went to work on those engines?

A. Yes.

Mr. Fulton: That is all. Take the witness.

Cross Examination

By Mr. Wood:

Q. Mr. Wuori, you made two circles around the Melody looking for survivors, did'nt you?

A. Yes.

(Testimony of Charles Wuori.)

Q. How big were the circles?

A. I didn't measure them.

Q. What do you think?

A. We didn't measure the circles, but you can make very short circle with the boat.

Q. Well, can you tell us how wide the circles were that you made?

A. Oh, I suppose, I said about around a mile; that is, through.

Q. A mile away from the Melody or a half mile away from the Melody?

A. Well, a circle is about a mile.

Q. About a mile in diameter? A. Yes.

Q. You made two such circles, did you?

A. I think we did, yes; maybe more.

Q. Well, how long did it take you?

A. I didn't hear you.

Q. How long did it take you to make the circles?

A. Well, it does not take long when your engine is turning continuously. We didn't set any time. We didn't watch the time when we were doing this. We just were trying to get the [65] thing done. The sooner the better, because we were afraid that the Melody might sink any time.

Q. How long do you think it took you? You say not long.

A. I wouldn't say anything, because I wasn't watching the time.

Q. It was a short time, wasn't it?

A. It could not be very long, no.

(Testimony of Charles Wuori.)

Q. What did you think had become of the survivors.

A. Well, we thought they had an explosion in there. That is the only way I can figure it out, and all got killed in the forecastle.

Q. Was there any evidence of an explosion?

A. No. But you had to think something when you saw a brand new vessel in a sunken condition like that. I think that——

Q. But you were in a hurry to get a line on the Melody, were you?

A. I am having an awful hard time to hear you.

Q. Were you in a hurry to get a line on the Melody? A. Yes.

Q. Regardless of the survivors?

A. Well, when we could not find anybody, what else we can do?

Q. You might have looked a little longer. It was a smooth sea, wasn't it?

A. Very nice seas, yes.

Q. You knew such a boat had a life raft, a lifeboat or something, didn't you? [66] A. No.

Q. You know all these fishing boats have some kind of a boat along with them, don't you?

A. No.

Q. They don't? A. No.

Q. Don't they have life raft? A. No.

Q. What do they have?

A. Life preservers. You have got to have them. That is, the U. S. Customs require them.

(Testimony of Charles Wuori.)

Q. How long have you fished off the Columbia River bar? A. I didn't hear.

Q. How long have you fished off of the Columbia River bar? A. Oh, for thirty years.

Q. Isn't it a custom among fishermen on these grounds to help each other when they get in difficulty?

A. Yes, and I have done so many times.

Q. And you have been helped, yourself, haven't you? A. How?

Q. And you have been helped yourself, haven't you?

A. By the Coast Guard. I have been towed in once by the Coast Guard.

Q. And you have helped other people, have you?

A. Yes. [67]

Q. Without making any selfish claims, haven't you? A. Yes.

Mr. Fulton: I object to that. I don't think that is competent. I don't know what it means.

Mr. Wood: I think it is very competent. I will state my position if the Court wants to hear it. I will reframe my question.

Q. Isn't it a custom among fishermen on those grounds to help each other without making selfish claims?

Mr. Fulton: I object.

Mr. Bowerman: As I recall it, you can't prove a custom. You have to plead it, if that is a defense here.

The Witness: May I say something?

(Testimony of Charles Wuori.)

Mr. Wood: Go ahead.

Mr. Bowerman: And besides it is not in the pleadings.

Mr. Fulton: And, besides, you can't change the law by a custom.

Mr. Bowerman: It is objected to as not proper cross examination, if your Honor please.

The Court: You said you would state your position, so you had better.

Mr. Wood: All right.

The Court: Yes.

Mr. Wood: I think their salvage is based on an implied contract to pay for the services and any custom prevailing on [68] those grounds where it is prevailing is part of the contract.

Mr. Fulton: We take the position there is absolutely no duty on anybody to attempt to salvage property. There is a duty, a duty of humanity to attempt, and to make every effort to attempt to save life. And as we understand the law of salvage itself, on account of the hazard involved in it the Courts of Admiralty enforce salvage claims. I don't understand it is in the nature of a contract. It is just the opposite. Anyhow, we have my objection.

The Court: Go ahead, Mr. Wood.

Mr. Wood: Will you answer the question, Mr. Wuori.

The Witness: What was it?

Q. The question is, isn't a custom among fishermen on the Columbia River bar to help each other out? A. At any place, yes, it is.

(Testimony of Charles Wuori.)

Q. And to do so without making a salvage service out of it; isn't that the fact?

A. I don't know.

Q. You don't know that? A. No.

Q. All right. Then if you don't know, let it go. I will ask you this: Have you ever known, in your thirty years on the bar, of one fisherman making a salvage claim against another?

A. I would not know.

Q. No. Now you speak of the hazards you went through. You [69] claim this service you rendered was dangerous, don't you? A. Yes.

Q. Well, when you had two Coast Guard boats alongside of you why did you go ahead with the service?

A. I didn't see any Coast Guard service there when the hazard was there, when we put the line on it.

Q. How soon after that did the Coast Guard boats appear?

A. We towed her about two hours approximately. I don't know for sure.

Q. After that the Coast Guard boats appeared, did they?

A. Then the Coast Guard boats arrived.

Q. At the end of two hours? A. Yes.

Q. About what time of day was that?

A. It was daylight.

Q. About what time of day?

A. I would not know.

Q. You hadn't got inside the jetties, yet had you? A. No.

(Testimony of Charles Wuori.)

Q. You were still out in the open?

A. We were out on the open, yes.

Q. And the more dangerous part of the service you said was when you got inside of the river mouth, and the currents?

A. Yes; when we had the tow on, yes.

Q. Yes. Now before you got in that dangerous part of it you [70] had two Coast Guard boats alongside of you, didn't you? A. Yes.

Q. And you would not let them take a hold; you wanted to do it all yourself, didn't you?

A. I don't know. How did you get that idea? They were towing the Melody the same as we were, three of us.

Q. They were towing the Melody, but so were you, weren't you? A. Yes.

Q. You didn't let go?

A. No. They asked what I wanted them to do. I said to put the towline on it and "let's all try to get this thing in before it sinks."

Q. You think it was a very dangerous service, but you kept your lines on just the same, with two boats there besides yourself, didn't you?

A. There wasn't any chance when we were out in the sea. When we entered the channel, then we needed more towline. We insisted on more towline, so we had more steerage.

Q. So before you encountered any danger you could have said to the Coast Guard, "You take her. I am through," couldn't you?

Mr. Fulton: I think that is argumentative.

(Testimony of Charles Wuori.)

A. I don't know why I should or shouldn't say so.

Mr. Wood: Q. Well, that is what your testimony sounds like to me. [71]

A. When we were trying to get that boat and salvage that property I don't think it would be the proper way for me to throw my lines out. I don't think so.

Q. The two Coast Guard boats were perfectly able to tow her in, weren't they?

A. I suppose so.

Q. And they did do it, didn't they?

A. But the more power the sooner we got in.

Q. After your line was fouled it was the Coast Guard boat that did take her in, wasn't it?

A. Yes, but we had the flooding in favor.

Q. And in the earlier part of it the tide was only half ebb, wasn't it?

A. The tide was about half ebb, or so, when we put the lines on.

Q. Yes. And by the time you got further in, say near Buoy No. 10, was the tide slack?

A. I think the tide was flooding already, but the tide is always setting westward outside of the jetties.

Q. Where were you when the tide turned?

A. I don't know.

Q. You don't know? A. No.

Q. Now will you please——

Mr. Wood: I want the Court to see this, is the

(Testimony of Charles Wuori.)

reason I [72] am carrying it up here, if I may, your Honor.

The Court: I will come down there.

Mr. Wood: All right.

Q. Mr. Wuori, will you look here, please? Has the Clerk got a copy of the libel here?

Mr. Fulton: There are a couple of matters I forgot to cover, but I suppose it will be all right to take them up later, your Honor.

Mr. Wood: Q. Mr. Wuori, that is where you placed the spot where the line was down?

A. That is what I think.

Q. Yes, but in your libel you place it further west, and I want to call it to your attention so you can have it any way you want it.

A. When we made this one we didn't have this chart, and I was thinking we were just about where we were. I explained to Mr. Fulton I didn't have this before.

Q. All right. Now just wait. In your libel you say that approximately later—can you read this with me? "approximately abreast of the west end of both the north and south jetties of the Columbia River, at about the hour of 11:15 or 11:30 o'clock p.m., the wheel of the vessel Stampede II became fouled with the towline of the Triumph." Now that would make it west of that line there—no; further out, west of that line there. A. No. [73]

Q. There is the end of that jetty, and there is the end of that.

(Testimony of Charles Wuori.)

A. No. You meant that one, the end of the jetties there?

Q. That is what you meant?

A. Well, I know it is there.

Q. The engineers don't agree with you, apparently, but place it anyplace you want to.

Mr. Fulton: There is the line.

The Witness: Yes, there is the line, and I thought we were inside of that line.

Mr. Wood: Q. Inside of it? A. Yes.

Q. But in your libel you thought you were west of it.

Mr. Fulton: It doesn't say that, Erskine. He said approximately that.

Mr. Wood: Well, I see what you mean. All right.

The Witness: This part is sunken.

Mr. Wood: Take your chair.

Q. Now you claim that after the line became fouled on your propeller, that you were still able to perform a towage service, do you?

A. Yes, after we freed our wheel, after we got the line out of there.

Q. Yes. And you never got all the line out of there, did you?

A. No. We had, in fact, some lines had been there about a month. [74]

Q. You didn't get all your line out of the propeller until you got on the beach, did you?

A. No.

Q. No.

(Testimony of Charles Wuori.)

A. Well, we got the rest of it, and also, if I can tell you, we had some lines there which had already been there over a month we got out of our net.

Q. Well, the fact is that from this place where you have marked on the chart where the line fouled, you yourself were towed in, weren't you?

A. Yes.

Q. By what boat?

A. I think it was Fort Canby.

Q. That is one of the Coast Guard boats?

A. Fort Canby lifesaving station boats.

Q. That is one of the lifeboats?

A. Yes, sir.

Q. Now do you claim that the reason the line fouled was because the Triumph crossed your bow?

A. Yes.

Q. And you claim that was bad maneuvering on the part of the Triumph?

A. Well, yes, I do.

Q. Now you have spoken of the work that was done on the beach in pumping the Melody out? [75]

A. Yes.

Q. And things like that? A. Yes.

Q. And you have used the word "we," "We did it." A. Yes.

Q. But, as a matter of fact, it was the Coast Guard that did it, was it not?

A. It was all four of us, myself also, with the Coast Guard, and I asked the Coast Guard the first thing in the morning before daylight if they have

(Testimony of Charles Wuori.)

got the power pump so we can use it, and they said they had.

Q. Now who took care of the boat, you or the Coast Guard, after it was on the beach?

A. We were on the watch there all the time. I don't know if anybody took the care of it until it was floated.

Q. What orders did you give toward taking care of these fish? Where did you have them sent to, or order them sent to?

A. Well, I was there with them. We took them over to the Columbia River Packers Association after the Melody floated.

Q. Did you know that Mr. Rustad was fishing for the Columbia River Salmon Company?

A. Yes.

Q. Or was selling his fish to them?

A. I didn't know if he ever sell the firm fish there. I think that was his ordinary fish. [76]

Q. You knew he was going to sell his fish to the Columbia River Salmon Company, didn't you?

A. Through the telephone conversation Frank Hoglund told me it is Tom Rustad's fish. But while I was taking care of that fish I handled everything just like my own.

Q. Mr. Wuori, all I want is this: You knew, didn't you, that Rustad had given his orders to have these fish taken to the Columbia River Salmon Company? A. No.

Q. You didn't know it. Why did you send them to the Columbia River Packing Company?

(Testimony of Charles Wuori.)

A. I have fished for the C.R.P. cannery for about thirty years.

Q. So you sent them to your own place?

A. Just about thirty years; more or less, perhaps.

Q. On what examination of the Melody do you base your statement that she depreciated in value about $3,000 as a result of this experience?

A. I inquired.

Q. Under what examination did you make a determination of that?

A. Well, there wasn't any damage on the hull whatsoever.

Q. No damage on the hull. Did you take the engines down? A. No. How could I?

Mr. Wood: Well, I didn't think you could but I just wanted to find out. That is all.

Mr. Fulton: If your Honor please, there were a couple of [77] matters I did overlook.

Redirect Examination

By Mr. Fulton:

Q. In the libel, Mr. Wuori, you stated you lost your cable? A. Yes.

Q. What was the value of that?

A. The value of the cable is—I couldn't tell you. I think it is $223.00, somewhere around that neighborhood. I don't know, without you open my logbook.

Q. You state in your libel there it was one hundred fathoms.

(Testimony of Charles Wuori.)

A. Three hundred fathoms.

Q. One hundred fathoms, three hundred dollars. As a matter of fact, three hundred fathoms would be about $250.00.

A. Well, the cables which I bought before this one cost me $300.00 apiece, and it wasn't until recently I inquired about what the price was. I don't pay much attention to what such-and-such an article costs. When the bill comes I pay the bill. Before the trial I went over to the Fisher Brothers and inquired about what the price of that cable was, when I replaced it, and they said it was $223.00, something like that.

Q. Now how much was your fuel oil expended on that trip?

A. Oh, I don't know. It is next to impossible to say, but including the cylinder oil and fuel oil I think it is somewhere about twenty or twenty-five dollars.

Q. How much was the Flick radio call? [78]

A. The Flick radio telephone call I think was $10.65.

Q. Now, Mr. Wuori, how many days did you lose from your fishing venture by virtue of this accident? A. We lost just about a week.

Q. How long do you stay out altogether?

A. Oh, it depends on what kind of fishing it is. Early in the spring it is quite often fishing is not so good, but we had the best fishing just at that particular time. Ordinarily we fish two days, three days, and even four days.

(Testimony of Charles Wuori.)

Q. What is the average value of the trip, the gross return of a trip?

A. Between two and three thousand dollars.

Q. A trip? A. Yes.

Q. You feel you lost how many trips on this occasion?

A. I lost a little better than one trip.

Q. You recall what your figures were for the trip that you made, the fishing trip that you made immediately prior to this accident happening to the Melody, what return?

A. I have got the statement right there. I think it was about two thousand dollars—well, can I take a look at that?

Q. Well, just approximately.

A. I think it is about three thousand.

Q. Three thousand dollars? A. Yes. [79]

Q. What was the next one following?

A. I made a mistake on that. That was two thousand. I didn't read right. It was two thousand before and three thousand next after I got it fixed.

Mr. Fulton: That is all, Mr. Wuori.

The Court: When did you folks learn that the crew were not aboard the Melody?

Mr. Fulton: Pardon me, your Honor. I didn't hear what your Honor said?

The Court: He said he thought that none of this crew had been taken off when he took hold of it. When did he learn differently?

Mr. Fulton: Yes.

(Testimony of Charles Wuori.)

Q. When did you learn differently?

A. Well, after we had our lines made fast on the Melody, when I made telephone calls first to C.R.P., I asked Frank Hoglund to call up and inquire about if they know anything about the crew of the Melody. Also I told him about I had already requested them to send a couple of lifeboats out, but if they haven't to please report again, so we can save that boat. And then after he had told me I promised at the time when I had my conversation, I promised to call him as soon as we got the lines made up to see if he had found out about the crew. When I called him again he said the crew was safe. That is the first time I heard it. [80]

Q. Approximately what time of the day was that? The Judge asked that question.

The Court: No. Relate it to another thing. Was that before the crash boat came up, or afterward?

A. I think it was after. I am not quite sure.

The Court: You said, I understood, when the crash boat came up you didn't know whether the crew was with them.

A. No.

The Court: Now what were you going to say about your notebook?

A. On my logbook there, I was so busy, I made several telephone calls to Coast Guard, and also to marine station. I made several calls to Coast Guard and marine operator between three and four o'clock. Ordinarily we put the accurate time right on the

(Testimony of Charles Wuori.)

minute when we talk to these others but at this particular time I was so busy I didn't have time to do it.

Mr. Fulton: Q. You were a little excited, were you?

A. Yes.

The Court: Anyhow, it was before the two boats came and put their lines on the tow?

A. I didn't hear?

The Court: Anyhow, it was before the other boats came and put their lines on the tow?

Mr. Bowerman: Are you hearing, Mr. Wuori?

The Witness: No. [81]

The Court: You ask him.

Mr. Fulton: I didn't understand it either. I am a little bit deaf myself.

The Court: I know, then, it must be my way of putting it. When he took hold of her he thought the crew was dead inside?

A. Yes.

The Court: All right. When the crash boat came up with the crew he did not know the crew was with the crash boat?

A. Nobody never told us before.

The Court: Now wait a minute. Let me finish. He is not sure whether he learned that the crew was alive before or after the crash boat came up?

Mr. Fulton: Yes, he is. He said after, as far as he was concerned.

The Court: He said a minute ago he wasn't sure.

Mr. Fulton: Maybe I am wrong here.

The Court: Now wait. I started to talk, so you

(Testimony of Charles Wuori.)

had better let me finish. He said a minute ago he wasn't sure whether it was before or after the crash boat came up. Now I am asking him if he is sure whether it was before the other two—the other three Coast Guard boats came up, two of which put lines on?

A. Yes, it was long before.

The Court: Long before that?

A. Yes. [82]

The Court: And they came up about two hours after?

A. Yes, approximately two hours. It could be less or more time elapsed.

The Court: Now if you want to add any more about that you may.

Mr. Fulton: Q. In your opinion, when was it that you learned that you yourself, personally—I am not talking about some other members of the crew—that you, yourself, personally, learned that the crew of the Melody were saved?

A. You mean accurate time, the time it takes?

Q. Yes.

A. Or the first proceedings of the work?

Q. Yes, the first proceeding, when you found out.

A. As soon as we got the line——

Q. Made fast?

A. ——made fast, and one of my crew members got back on board the boat, we run the towline out and when the towline was out I started to telephone the Coast Guard and at that time one of my crew

(Testimony of Charles Wuori.)

members, who was on the boat Melody, was down in the forecastle dressing or putting the dry clothes on.

Q. All right. Now just shortly before they left you asked the crew to put this crash boat to work?

A. Yes.

Q. Tell what happened there?

A. Well, they didn't make any attempt to do anything, and, if [83] I am not mistaken, I asked them how about to get this thing in, and I think they answered, "We are not equipped for towing and saving any property; just for life." And they were setting there, some on the forecastle head, some on the main deck on the rail.

Q. Then what happened? How long did the crash boat stay after that?

A. It seems to me they stayed there until shortly after they took one of my crew members back on the Stampede.

Q. How long were they there altogether in that vicinity?

A. I could not tell you. Maybe from five to fifteen minutes.

Mr. Fulton: That is all.

Recross Examination

By Mr. Wood:

Q. You testified just now that the line that you lost was of some value. That line was lost because it was fouled on the bottom, wasn't it—your line that you lost? A. How?

Q. Wasn't the line that you lost——

A. Yes.

(Testimony of Charles Wuori.)

Q. ——fouled on the bottom?

A. I don't know.

Q. Well, why did you lose it?

A. We had to let go.

Q. Why did you lose it? [84]

A. We had to let go because we had this Triumph line on our wheel already and we could not get it loose. We could not get our line loose from the Melody. It was the easiest way to let pull from our end of the line.

Q. You didn't know whether it was on the bottom or not? A. No.

Q. All right; let that go. Now you said you lost a week's time? A. Yes.

Q. Why did you lose so much time?

A. Well, first, we had to stay there on the beach one day.

Q. What for?

A. To get to refuel our vessel.

Q. All right.

A. Then it took us so long to get the equipment back in the place, to put the cable on, and so forth.

Q. It took you a week to do that?

A. Almost a week, yes.

Q. What time did you get your line free from your propeller?

A. The first thing in the morning, before daylight.

Q. You got that free? A. Yes, sir.

Q. It took you a week, then, to get ready for sea after that?

(Testimony of Charles Wuori.)

A. Yes, and we worked pretty hard, too.

Mr. Wood: All right. That is all.

Mr. Fulton: That is all.

(Witness excused.) [85]

The Clerk: State your name, please.

Mr. Syvanen: Armand Syvanen.

ARMAND SYVANEN,

one of the Libelants, was thereupon produced as a witness in behalf of the Libelants and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Fulton:

Q. You are a member of the crew, or were a member of the crew, at the time that this salvage of the Melody was made? A. Yes.

Q. Just tell the Court in your own words just exactly what happened out there, the time that the Melody was sighted—just relate the story and save my asking a lot of questions.

A. Well, we were headed for the fishing grounds up on Destruction Island, in the vicinity of Destruction Island, and Christensen was at the wheel. The skipper was taking a nap at this particular time, and I was laying down on the hatch sunning myself and I glanced about and I noticed a ship or a boat while I was laying there. I was looking

(Testimony of Armand Syvanen.)

around. I didn't pay much attention to it, except it semed to me that she had a heavy list, and—well, I was there, and then Kurtti happened to notice the vessel and he called my attention to it and said apparently there was something wrong with it. So I don't recall for sure whether I told Christensen, who was at the wheel, or whether we called the Captain first, but we [86] called the Captain and told him there was a vessel that seemed to be in distress. We called the Captain and he told us to approach the vessel and see what the score is. When we got there we found this vessel foundered, so we made a couple of circles around the area to see if we could sight any wreckage or anything a man could be hanging onto, but could not see anything. And then I don't know what these other men felt about it, but we decided to try to get a line aboard and see if we could not tow it in. The skipper—let's see.

Q. What?

A. I was trying to think. How far do you want me to go with this?

Q. Go ahead. What did he say? What did the skipper say?

A. Well, he told us we ought to take the boat in; we ought to get it in; and asked us if we were willing to help him get it in, and we agreed to assist in the operation. So he asked one of us if one of us wanted to board the vessel and attempt to put a line on it, and I said I would.

Well, I changed my clothes, put on a pair of

(Testimony of Armand Syvanen.)

wool socks and a pair of shorts, and we circled, and—well, before this we had circled the vessel several times to try to determine the name and to try to locate the name. After I got ready we circled to see if we could not determine the best position to get aboard, and so finally we decided it would be best to be heading the bow in towards the corner of the poop there, [87] which was floating higher than the rest of the vessel, to put a line on board to get aboard. So we made several attempts there to get out, because there was a swell and you have got to be careful. You can't be battering the boats around together. So after a little jockeying I managed to get aboard the Melody. Then I looked around to see if there was any place——

The Court: How far did you have to swim?

A. I didn't swim.

The Court: You jumped over?

A. I jumped from the ladder on the bow of the Stampede over to this floating part of the poop desk on the Melody. And I got aboard and had a little difficulty. I looked around on deck to see if I could find a place on deck to attach a line, but it was impossible. There was nothing there on deck that would hold a tow. So I decided the best bet would be to get the line around the cockpit and around the rudder stock. So I went down in the cockpit. I had to get underneath of the deck mast of the cockpit. Even the open part of the cockpit was under water but the portside was clear of the

(Testimony of Armand Syvanen.)

water and I was able to get clear down in there without ducking my head under water, but in putting this line around the rudder stock I had to get underneath the deck, the floating part of the deck, and reached around and got the line started around. In order to get it around there I managed to jockey it around [88] my foot. I got hold of it with my toe, pulled it around and throwed a bowline in it and had that secured then to our wire towline and got ready to go.

Q. Would you say there was any danger connected with that operation?

A. Well, in this cockpit there were various, oh, plywood and some doggone thing, I don't know what it was in there for. It was adrift. And there were lines, I don't know whether they were jacks or whatever they were; they might have been jacks for trolling. I think they were jacks, down in this cockpit.

Q. A jack is a hook?

A. A jack is a hook used for the trolling of fish, and I don't know what type of things they were, but they were some hooks of some kind. Then there was this plywood. Then there was another thing. The vessel was loaded there and she was rolling in the swell. That works the rudder and you always have a chance to get fouled up—your tiller, tiller line, in getting underneath the tug there, and in case the vessel would sink you would have trouble clearing yourself, coming out of that.

(Testimony of Armand Syvanen.)

Q. Well, you had some apprehension about your safety then, I take it, while you were there?

A. Yes.

Mr. Wood: I object to that as very leading. [89]

Mr. Fulton: Q. What happened then, after that?

A. Well, then this crash boat arrived. The crash boat arrived on the scene and they put this rubber life raft out. Then they came over to the Melody and saw what was going on.

Q. Do you know how they happened to go there?

A. How is that?

Q. Do you know how they happened to go out to the Melody, and what caused them to go out there?

A. Well, they saw the Stampede, I guess.

Q. You don't know that Mr. Wuori asked them to take you off, do you? I think Mr. Wuori testified to that.

A. I didn't hear Mr. Wuori say that, but——

Q. You never heard it?

A. No, but I asked those fellows myself if they would give me a lift there.

Q. Oh, you asked them? A. Yes.

Q. Who was on the life raft to come after you?

A. I am not certain. I believe it was Mr. Rustad, the Coast Guard.

Q. Did you ask what happened to the crew of the Melody? A. I did. I asked them.

Q. This gentleman?

A. I am not sure it was that gentleman.

(Testimony of Armand Syvanen.)

Q. What did they tell you? [90]

A. They told me the crew was picked up. The crew was safe.

Q. All right. What is your judgment of the time, the approximate time, that you sighted the Melody?

A. Oh, in the vicinity of 2:30.

Q. What time do you think you started the tow? A. Oh, at some time after 3:00.

Q. Do you recall the time that the Melody arrived and was beached?

A. Well, that is just—I could just judge from the time I went to bed. I know I went to bed around 2:00 o'clock, and probably around a half hour or forty-five minutes before I got——

Q. It was somewhere around 1:00 o'clock?

A. Yes, in that neighborhood. I know I hit the sack at 2:00 o'clock and it was forty-five minutes or a half hour before that.

Q. Now did Mr. Rustad, or any of the members of this crew, offer any assistance to you people?

A. Not to my knowledge.

Q. Did they offer any the next day when you were pumping out the vessel?

A. Not to my knowledge.

Q. Did you refuse any offer of assistance? Well, of course that goes without saying. Oh, yes. Please explain the position of the Melody in the water at the time you found her, [91] how much of her was above flood, how much above water?

The Court: Pardon me, Mr. Fulton. Do you remember the name, so I could find it in my files,

(Testimony of Armand Syvanen.)

of the salvage case you tried, the Lincoln County salvage case you tried? Do you know how that would be entitled?

Mr. Bowerman: Unga.

The Court: Unga?

Mr. Bowerman: I think so.

The Court: That was the name of the complainant?

Mr. Bowerman: Oh, no. That was the boat. I can get it.

The Court: I wanted to get it now.

Mr. Bowerman: If I can use the phone.

The Court: I don't want to take you out of court.

Mr. Bowerman: Oh, I am not doing anything useful here.

The Court: All right.

Mr. Fulton: Q. Just explain the position of this boat in the water being submerged.

A. Well, the only part of the tug that was afloat or that wasn't swash, was the afterport corner of the vessel by the poop.

Q. What would that be in square feet?

A. Well, I would say roughly that it was six square fet, or more than that.

Q. Of the deck?

A. Of the deck, that wasn't awash.

Q. That is a turn of the port stern. How high was the pilothouse [92] out of the water, the top of her?

A. As I recall, all you could see was part of

(Testimony of Armand Syvanen.)

this flying bridge, and I believe there was the corner of the portside, the forward part of it, showing. You could see on the starboard side part of the flying bridge was submerged.

Q. The hull was absolutely awash, wasn't it?

A. Absolutely, except this stern part of the poop deck.

Q. What angle was she on, say forward and aft? A. Forward and aft?

Q. How much was she sinking down by the head?

A. I would say the bow was completely submerged. What do you want, the angle?

Q. The angle the bow was down off of the level.

A. Oh.

Q. Approximately what was the height of the vessel from the keel to its depth?

A. From the keel to its depth?

Q. To its stem. The top of the bow—the top of the stem, I should say.

A. Oh, I would say around twelve foot. I am not very qualified.

Q. Could you see the top of the stem and the top of the bow of the vessel at all?

A. I don't recall that. I know the bow was submerged.

Q. Clear out of sight?

A. Yes, the bow was submerged, but I don't recall. What I mean [93] is, the deck was submerged.

Q. Well, in your opinion, state whether in your opinion the vessel was settling or had settled, low-

(Testimony of Armand Syvanen.)

ered deeper into the water during the time you were there?

A. Well, to me it seemed like the vessel was in a sinking condition, and I know in towing her we righted her so she would tow on an even keel, making her seaworthy more than she would be lying on the side.

Q. Did you yourself have any idea about her?

A. It would not have surprised me if it had sunk. It was just hit and miss, from what we could see.

Q. How long have you fished out of the Columbia River bar—out of the Columbia River, I should say? A. That is, deep sea fishing?

Q. Yes.

A. I have been only out since about a year ago.

Q. You haven't had very much experience with the currents out there at Peacock Spit?

A. I have had very little sea experience; that is, with fish boats.

Q. As I understand, you retired about what time that night, shortly after the Coast Guard boats showed up? A. About 2:00 o'clock.

Q. About 2:00. You were not in the hold. Were you on deck? A. Oh, you mean—— [94]

Q. During the tow? A. During the tow?

Q. Yes.

A. Yes. After we got under way, after the other towboats, or these Coast Guard boats and the tow got under way I stood a short trick at the wheel and then I retired.

(Testimony of Armand Syvanen.)

Q. And how long were you retired before you were next called?

A. Well, I was called when we were maneuvering around there after the wheel was fouled up.

Q. Have you any idea what time that was at night?

A. Oh, in my judgment I would say around 11:00.

Q. In your opinion how long after that was it before the vessel or before the Melody was beached?

A. Well, I have already said it must be about, oh, one-fifteen or one-thirty.

Mr. Fulton: I think that is all.

Cross Examination

By Mr. Wood:

Q. How far away was the Melody from you when you sighted her from your sunbath position on your boat?

A. Well, I could not determine that because I just glanced at it. It was sort of—I didn't pay any attention to it really. I just happened to glance at this vessel and saw it there and I didn't pay any particular attention to it because I thought she was laying in a peculiar position. It seemed to [95] me she was in a heavy list.

Q. She wasn't completely then over on her beam ends at that time?

A. I could not tell that. I just took a glance. I was laying there and I just noticed this vessel. I paid no attention to it at that time.

Q. Well, when you had the conversation with

(Testimony of Armand Syvanen.)

the other fishermen you said, or you said the boat seems to be in a peculiar position. You must have had more than a casual look at her at that time?

A. Yes. He told me he thought there was something wrong with it then.

Q. How far way was she then?

A. Oh, I would say between—oh, right in the vicinity of a quarter of a mile.

Q. And did you hear Mr. Wuori say that the visibility, while it was good there was kind of a summer haze on the water? A. I did.

Q. Did you agree with that?

A. The only thing I recall about the water, I know it was a sunny day because I was checking the sun.

Q. The point is, if you, not being on the lookout, not watchful for anything, could see this boat in the summer haze a quarter of a mile away, while you were taking a sunbath, right afterwards she could not have been so submerged in the water, as some of [96] the witnesses have made out. That is the point.

A. The only thing I can say there about sighting the vessel, it struck me as being in a heavy list.

Q. About a quarter of a mile away?

A. Just as a shot at it.

Q. Then when you went up alongside of her you could read her name, the Melody, couldn't you?

A. Yes.

Q. You said that her name appeared?

A. We circled her to try to read the name.

(Testimony of Armand Syvanen.)

Q. Yes.

A. We could read part of the name. If I recall it right, this name was in front of this flying bridge and you could read part of that name and make it out.

Q. I don't understand where you said it was. Under the by bridge?

A. Under the flying bridge.

Q. Under the flying bridge?

A. That is as I recall it.

Q. How long were you occupied in tying this line around the rudder stock?

A. Tying this line around the rudder stock?

Q. Yes. A. Oh, fifteen minutes.

Q. And, as I understand it, you stood in the trolling hatch [97] and went partly under the deck to reach the rudder stock; is that the way it was?

A. That is right.

Q. You didn't have to go completely under water yourself to do that, did you?

A. I submerged, or was clear up to my shoulders, but I had to get underneath the deck.

Q. Yes, but I mean you were not under water so you could not breathe? A. No.

Q. No. You said a moment ago that you guessed, or estimated, that there was only six square feet of the Melody above water. That would be only two feet one way and three another? Is that what you mean?

A. Well, I say approximately form the quarter of this deck over to the hatch or the coaming of

(Testimony of Armand Syvanen.)

the cockpit. There was enough room there from the coaming of the cockpit so I could get down into it.

Q. I don't know whether you meant that was six square feet or six feet square, I should say. Which did you mean?

A. There was this much of the boat afloat. There was part of just the after corner of this cockpit was afloat, and the deck back to the quarter, after corner of the deck.

Mr. Wood: That is all.

The Court: Mr. Wood, I am sure I don't need to say this, [98] but so that anybody won't think there are any secrets around here, Mr. Bowerman and Mr. John Hall represented the respondents in a salvage claim, which was vigorously contested here quite a few years ago, and this was briefed extensively on the facts as well as the law. That is what I was just asking about. It was Civil No. 155, Pitts v. Packers Association.

Mr. Fulton: That is all.

(Witness excused.)

The Clerk: Will you state your name, please.

Mr. Kurtti: John Kurtti.

JOHN KURTTI,

one of the Libelants, thereupon took the witness stand as a witness in behalf of the Libelants and, having been first duly sworn, testified as follows:

(Testimony of John Kurtti.)

Direct Examination

The Court: You were in the Feltre case, too, weren't you?

Mr. Bowerman: Yes, your Honor.

The Court: Yes. I find that case here, too, in the file. I wasn't in that case. That is A-12875. That was the collision between the Edwin Luckenbach and the Feltre, in February, 1937, in the Columbia River. That case was tried by Judge Fee.

Mr. Wood: Yes, your Honor, that is right.

By Mr. Fulton:

Q. Mr. Kurtti, you are a member of the crew of the Stampede? A. Yes. [99]

Q. And when did you first see the vessel, see the Melody? Approximately what time of the day did you first see the Melody? I am not going to ask you a lot of preliminary questions, but approximately what time?

A. I should say some time between 2:00 and 3:00 o'clock. I could not say approximately just the time, because I didn't have no watch along with me, and I don't think I would have looked at it even did I have one.

Q. I think you spoke to Mr. Wuori and told him about it, that you had seen the boat?

A. Yes.

Q. And discussed it. And I will say the Captain, Mr. Wuori, was asleep down below somewhere.

A. Yes. He was laying in the bunk.

Q. And you reported it? A. Yes.

Q. Just tell what you did from there on, and

(Testimony of John Kurtti.)

what the vessel did and all of you did. Did you make any circles?

A. Well, when we sighted it, when the skipper got up he gave orders for the mate, Mr. Christensen, to change the course to the west.

Q. Would you talk louder, please?

A. To approach or whistle.

Q. Yes.

A. So we got closer. I told Mr. Wuori, "There must be something [100] wrong, because she was listed so heavy. We were on deck then aft. When we got close the boat was under water, except just parts of it showing. So we got there and we looked around, made a few circles around there to see if there were any men floating or on her, or swimming; then we approached the boat. We didn't see no life of any kind on her.

Q. No lifeboats or life rafts?

A. No life rafts, or men swimming around her with life preservers, so we started to make an attempt to tie it. So after that I was busy with the lines. I didn't have much time to look around. I was busy handling lines and straightening them out of the coils.

Q. What was your business? What were you doing at the time? Were you on the winch?

A. I was on the winch then when we started to tow and slack off the lines slightly. I handled the winch—handled the brake on the winch.

Q. Explain again the condition of this boat, the

(Testimony of John Kurtti.)

position in the water. How badly submerged was she?

A. Well, she was down; the bow was down. There was only part of the stern and the bait tanks, part of the bait tanks—half of the bait tank was visible on that boat, and the stern of the poop deck.

Q. How high was the highest part of that boat that was out of water, the highest point out of water outside of the mast, I [101] guess? How much of the pilothouse was out of water—above water?

A. Oh, I should say about a foot and a half or two.

Q. The highest point?

A. The highest point.

Q. What was the highest point of the stern that was out of water?

A. Oh, the highest point of the stern—I don't think it was more than about a foot and a half, or something like that, from the water to the coaming.

Q. Yes.

A. That is, the highest point. But in conditions like that——

Q. Outside of the pilothouse there was no other part of the cabin showing? A. No.

Q. Just about a foot of the cabin or the pilothouse was showning? A. Yes.

Q. And was it down on the portside?

A. Yes.

(Testimony of John Kurtti.)

Mr. Wood: He said two feet.

Mr. Fulton: Q. What about the pilothouse? Was that above water?

A. No. It wasn't listing so bad.

Q. She was listed, part of it? [102]

A. Yes.

Q. I suppose by the rolls of the waves it was?

A. Well, I didn't notice, because I was busy working with the lines, so I didn't notice. When it was rolling, and all, probably it did come up, but I didn't see it, as far as I can remember.

Q. Well, all right. Did it look to you like a boat that might sink momentarily? A. Yes.

Q. What in your opinion—state whether or not in your opinion the vessel was sinking, or had gone down deeper in the water than it had when you first came there. Or did you notice that?

A. Well, it seems to me it was going down slowly but I could not figure it out, the cause of it. Another thing, I can't see what kept it afloat.

Q. But what I mean is, did you have the feeling that the boat was sinking lower and lower in the water?

Mr. Wood: I object to that as very leading. He has already answered that he could not tell that.

Mr. Fulton: Q. Was she awash inside?

A. Yes, sir.

Q. Was there any place, was there any part of the boat that you could get into, inside of her?

A. No, except that little hole on the stern.

(Testimony of John Kurtti.)

Q. Where Mr. Syvanen talked about? [103]

A. Yes.

Q. Everything else was filled with water?

A. Yes.

Q. Except maybe a foot or so on one corner of the pilothouse? A. Yes.

Q. Everything else—— A. Was awash.

Q. Except part of the bait tank, which was above water?

A. Well, the bait tank, yes; part of the bait tank was.

Q. All right. Where were you when the rudder became fouled?

Mr. Wood: The rudder didn't become fouled.

Mr. Fulton: The wheel. The wheel.

A. I was on the deck.

Q. The afterdeck or forward?

A. Yes, the afterdeck.

Q. What were your duties there?

A. I was leading a cable on the Triumph. We were taking in the tow line.

Q. You were taking in the towline?

A. Yes. And these drums don't lead good. A fellow has got to be standing by and lead it so it won't foul.

Q. In other words, you take the line in as fast as the boat slows up? A. Yes.

Q. You keep steadily bringing it in. Did you notice this tow [104] at the time you were doing that?

(Testimony of John Kurtti.)

A. Yes. Once in a while I took a glance on the other side.

Q. Did you notice whether or not Mr. Wuori changed the course of the Stampede in any respect? A. No, not that I know of.

Q. Did he change his position with the tug?

A. No. I don't know a thing about that, because all I could see was on the sides. I could not tell ahead what was going on, if he changed his course or not.

Q. If he changed his course the tow would be in a different position, wouldn't it? You don't know that?

A. Leading a cable through the drum of the Johnson bar a fellow has got to keep his eye on that all the time, so he hasn't got much chance to look around to see what is going on outside of my own job.

Mr. Fulton: I think that is all.

Mr. Bowerman: Just a minute.

(Mr. Bowerman and Mr. Fulton confer in undertone.)

Mr. Fulton: Q. Were you on deck or awake during all the time this salvage operation was going on?

A. No.

Q. What part weren't you awake, or what part did you observe? What part did you observe, rather, of the operation?

A. Well, the operation. Well, like—oh, you mean at the Melody, when we were pumping it

(Testimony of John Kurtti.)

out, when it was beached. Well, [105] I handled this hose down in the hold and cleared the floating boards off the ways so we could get the hose further down in.

Q. You were there when Mr. Syvanen made fast the line to the Melody? A. Yes.

Q. All right. How long did that operation take place from the time he departed to the time he left the Melody, approximately?

A. Oh, about twenty minutes; fifteen or twenty minutes, something like that.

Q. Fifteen or twenty minutes. Did you see the crash appear? A. That is, I didn't——

Q. Did you see it from where it approached, where it appeared, from what direction it came?

A. No, I didn't.

Q. Did you talk with any of them? A. No.

Q. Did you hear any conversation between any of them, any of the members of the crew of the Triumph? A. Not as I can remember of.

Q. Do you know approximately the time the tow was undertaken? If so, state it—when you started out with your tow.

A. Well, I can't say for sure but it must be around 3:00 o'clock; somewheres around there. It was in that neighborhood.

Q. All right. Do you recall the approach of the Coast Guard [106] vessel to assist in the tow?

A. Yes. I saw him coming.

Q. All right. Just tell what happened.

A. Well, one of them came close, the smaller

(Testimony of John Kurtti.)

boat. He stopped there and asked Mr. Wuori what they could do for giving help. Mr. Wuori said, "Give us help. Kind of put a line on and give us help for towing." And they put a line—I boarded the Melody and put a line on.

Q. On what side of your vessel?

A. The portside, the left side.

Q. On the left side of your vessel. That would be on the north? A. Yes, sir.

Q. The north side coming into the river?

A. Yes, sir.

Q. What happened then? Then how long after that did the next Coast Guard boat show up?

A. I could not say that. Soon after.

Q. Soon after. All right. Then tell what happened?

A. Well, they put their line on the boat, on the Melody, to assist our tow—give us help.

Q. Can you give the Court any idea what time that was about, what time of day? Was it still daylight? A. Yes, it was daylight.

Q. What time was it, in your best judgment?

A. Oh, I should say 5:30 or 6:00 o'clock.

Q. All right. Then what happened after that?

A. Well, we were coming in, towing the Melody in towards the river or towards the channel around the——

Q. Well, what was the next thing that happened out of the ordinary out there that evening?

A. Well, the next thing that happened was when the wheel was fouled.

(Testimony of John Kurtti.)

Q. Are you familiar with this chart here, that is Libelants' Exhibit No. 2? It is a chart of the Columbia River. Are you familiar with that chart?

A. No, I am not familiar with the charts.

Q. You are not? A. No.

Q. You are not a navigator?

A. Of course, I only fished a short while, about a year outside.

Q. Are you familiar with the north and south jetties? A. Yes.

Q. Where in your opinion, or do you know the position of the Stampede and the Triumph, or the flotilla there, at the time the wheel of the Stampede was fouled? Do you know what your position was in reference to any landmark or buoy, or anything else?

A. Well, I thought we were inside the line. If you put a line across, you know, from one to the other, I thought we were inside [108] of that line.

Q. What makes you think that? Were you watching that evening, or anything?

A. Well, I took a look at the north jetties once in a while and I could tell from it on the other side.

Q. You had passed the north jetty?

A. Yes.

Q. You are sure of that? A. Yes.

Q. All right. What happened then after you got in there? You say the line was fouled. Just tell what happened. You were back there having no interest. Just tell how this happened. That is what we want to know.

(Testimony of John Kurtti.)

A. Well, when the wheel was fouled we had to cut that boat loose.

Q. What boat was that you cut loose, the Triumph? A. Yes.

Q. All right.

A. Then when we cut that loose from our boat they took their line aboard and then we tried to get that other part of that line tied to the Melody from the wheel. So we faced it up with that poop pulled high enough so we could hold it by hands and held it there so when Wuori cut them off we could pass it on to the Triumph again.

Q. Yes.

A. And then we had to let go our line. [109]

Q. All right. Then what happened to your vessel?

A. That third boat took us under a tow.

Q. How long were you under tow before you arrived at the Coast Guard base?

A. Oh, I should say about an hour and a quarter, or something like that.

Q. Well, state whether or not you stood by and watched the tow there, or do you know anything about that? A. No, I don't.

Q. Who was at the wheel at this time of the Stampede? Mr. Wuori, was he?

A. Well, I could not say who has. You see, I was on the afterpart, on the deck.

Q. I mean after the time you were taken in tow by the Coast Guard? A. Yes.

(Testimony of John Kurtti.)

Q. You still stayed in your position on the afterdeck?

A. Yes. I was just standing around there.

Q. Watching the tow? A. Yes.

Q. And the tow was progressing all right, satisfactorily? A. Yes, sir.

Q. And do you know what time the tow—what space of time was there between your arrival, I say the Stampede's arrival and the Melody's arrival at the Coast Guard base? [110]

A. Oh, I could not say that. I could not tell the time, just how much difference there was.

Q. Was there a couple of hours or just a comparatively few? A. Oh, just in the minutes.

Q. Just minutes. All right. What was done when the Melody arrived there?

A. She was beached.

Q. She was beached. All right. What was the condition of the water at that time?

A. The tide? Approximately it was ebbing.

Q. Just starting to ebb. Well, what did you do with reference to salvaging the equipment, paraphernalia, fish, engines, and so forth?

A. Well, I didn't do anything during the night. In the morning we did, but not during the night we didn't do anything, because the water was high so we could not do anything.

Q. All right. When did you start to work on her? Just tell me what you did with reference to salvaging it, taking care of it, saving equipment, the fish, and so on, and what was done?

(Testimony of John Kurtti.)

A. Well, the pump was brought there and the hose was put into the hold.

Q. What?

A. The pump was brought, the Coast Guard——

Q. I am talking about what you did. [111]

A. What I did? I handled the hose into the hold and then cleared these boards off of the way when it was floating so as to get the hose in there deeper.

Q. Did you accompany Mr. Wuori to the Coast Guard?

A. No, I did not, but I was down in the hold.

Q. You were down in the hold?

A. I was down in the hold, holding that hose.

Q. Feeding it down? A. Yes.

Q. And how long were you working pumping this water out, just the actual pumping of it? How long did the actual pumping of it take after you had the pumping position and was ready to pump?

A. I should say about an hour, actual pumping.

Q. About an hour. You know how much work or how much time it took assembling the pump from the Coast Guard station, getting it up there and putting it down?

A. No, I don't know that.

Q. But it took at least an hour to do that?

A. Yes.

Q. Then what was done after that, after the vessel was pumped out? Do you know anything about that? A. No.

Q. Making any attempt to salvage the fish or dispose of the fish down there? [112]

(Testimony of John Kurtti.)

A. Well, I was sent—we were sent to the packing company by Charlie Wuori to get a skiff that we were going to start salvaging the fish from the boat and haul it up there, but then he had decided in the meantime not to do it, so we left the skiff there, up by the station. We already had it down in the water ready to run down with it.

Q. One time it was thought the best and most expedient thing to do was to take the fish out, and then later Mr. Wuori came to the conclusion it was better to take it up at the cannery?

A. Yes. Point Adams I think is a seine skiff. It wasn't a seine skiff. It was one of these little sculls repairmen use. It was up on the dock there. We loaded it down to the river, already to go down, then Wuori had sent Cy along to tell us not to take it down.

Q. He came to the conclusion you could take the fish off at Astoria, and take them off there with less trouble? A. Yes.

Q. Did you see the Captain, or any of the members of the crew, of the Melody down at the Coast Guard station during the time you were there doing the work, pumping her out and taking care of the equipment, getting her ready?

A. I saw men there but I didn't know who they were.

Q. Did anybody come up and offer you any assistance outside of the Coast Guard boys?

A. No. [113]

(Testimony of John Kurtti.)

Q. You worked, and worked hard there, did you not?

A. It wasn't really hard work but it kept us busy.

Q. All right. Now did you see Mr. Syvanen aboard the Melody out there make fast his line? Did you watch him carefully? A. What.

Q. Did you see Mr. Syvanen aboard the Melody and make fast the towline? A. Yes.

Q. I would like to have you tell the Court, in your opinion, whether or not that was a service with any hazard connected to it, to his life, to his person, or to his limb? Was there any hazard connected with that?

A. Well, if I was going in there, I should think it was kind of a risk. You may get hurt, or something may slip down there and you would get hurt, or maybe get thrown underneath. I would not say, but I think it kind of hazardous to go on the boat.

Q. Any hazards or possibilities the boat might sink at any time? A. Yes.

Mr. Fulton: That is all.

Mr. Wood: No questions.

(Witness excused.)

Mr. Fulton: Mr. Christensen. [114]

Mr. Wood: If your Honor please, it is quite evident we are not going to reach our side of the case and I have to do something before 5:00 o'clock. May I be excused?

Mr. Fulton: This is my last witness, though.

Mr. Wood: Even if it is, I don't imagine we will go into our case this late this afternoon.

The Court: No. We will just hear this man.

Mr. Wood: Yes. I think I will be excused, if your Honor please.

Mr. Fulton: Mr. Christensen, please.

The Clerk: State your name, please.

Mr. Christensen: Cyrus C. Christensen.

CYRUS C. CHRISTENSEN,

one of the Libelants, was produced as a witness in behalf of the Libelants and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Fulton:

Q. The first question I am going to ask you, Mr. Christensen, is, you were a member of the crew on this salvage operation here?

A. Yes.

Q. Did you hear any conversations between the members of the crew of the crash boat and Mr. Wuori? A. I did. [115]

Q. What was it?

A. Well, when he first came up alongside they were just standing there watching us a while, and we thought maybe they were going to take a line on there, so we just kept watching, so he went over there all of a sudden and said something like,

(Testimony of Cyrus C. Christensen.)

"What is the matter with you fellows? Why don't you take a line?" or something like that, see?

Q. He asked them to take a line aboard?

A. Yes. That was on the crash boat.

Q. What answer did he get?

A. Well, he didn't get much of any answer.

Q. You didn't hear any answer?

A. Well, yes. They did talk a little bit,—that they didn't take any line on any boat; they just picked up lives.

Q. Not property?

A. Not property. That was all that was said.

Q. Did you hear him ask them to put on some chafing gear?

A. Yes. Well, when he asked them, he asked them to put on lines.

Q. And what answer did they give to that, if any, do you recall?

A. I don't recall the answer to that. They probably—well, they didn't—I guess they didn't have any.

Q. All right. What was approximately the first time that you saw the Melody?

A. Well, we were quite a ways away from it when I first saw it, [116] and I didn't say anything to anybody right away. I was at the wheel. The other two fellows were aft and Mr. Wuori was inside, and I was steering a little north of it all the time and they kept watching something to our left for quite a ways. I could see something white in the water and a mast, kind of leaning towards

(Testimony of Cyrus C. Christensen.)

the north, and at first I thought it was a drag boat picking up a heavy haul, a heavy load of fish picked up at one side, with a heavy load, and got a little closer. You could not make it out right away. It kept looking funnier all the time. It seemed at first I could see more light until we got within,—well, within a half a mile or so of it. Then I got to talking to fellows in the tug. They had been looking at it, too, I guess, oh, I don't know how long. So they called Mr. Wuori and he came and took the wheel and come right over to it. We didn't steer out of the course to go right over to it but got pretty close. We could see that it was sunken at that time.

Q. Did you make any effort looking for any survivors?

A. Well, he took the wheel then.

Q. Was there any talk about looking for survivors? A. Yes.

Q. You were all on watch for that, were you?

A. Yes.

Q. Approximately how many circles around there did he make, do you know? [117]

A. Well, I don't know. I guess we made a couple of circles around there, going around there, going around, and then when we went around I think the first time that she started around close kind of looking to see what boat it was.

Q. First you made a couple of circles, as I understand it, looking for survivors; is that right?

(Testimony of Cyrus C. Christensen.)

A. Yes.

Q. Then after you made these circles, then what did you do?

A. Well, we went—we were getting pretty close to the boat, and then we could see the name, part of the name until we made it out.

Q. In other words, after you looked for the survivors, then you went to find out what was the name of the vessel; is that it? A. Yes.

Q. O. K. Why couldn't you read the name?

A. Well, it was partly under the water. At first we could just see the first two letters, M-E; then in come a wave, and a little bit later maybe we could see another letter or two, and we made out the name.

Q. You could see the name was written on the stern? A. No.

Q. Could you read that?

A. Couldn't read that.

Q. Could not read that. Why? Why couldn't you read it? [118]

A. It was under water.

Q. Under water. This letter that you did see, you say, the M-E, where was that written?

A. That was on the pilothouse.

Q. What part of the pilothouse?

A. By the flying bridge.

Q. I mean was it on top of the pilothouse on the roof, or the floor of the pilothouse? How would you describe that?

(Testimony of Cyrus C. Christensen.)

A. No. It was right in front of the pilothouse, on the flying bridge.

Q. Well, this piece of apron here at the top, the outside top of the pilothouse, was covered with canvas, just like that, where you walk up there?

A. Yes.

Q. Where you have a flying bridge there, and the wheel above it? Was that written on that?

A. I could not see that part of the house. Where I saw the name was in front of the pilothouse on a canvas, what they call a flying bridge.

Q. That is the apron?

A. The water was halfway up that wall on the pilothouse. That wheel is about an inch and a half, I guess, in diameter.

Q. And across this apron, or, you might call it, a railing that surrounds the top of the pilothouse made of canvas, it is part of the wall? [119]

A. It is sort of a windbreak that was there.

Q. There is Melody written on that?

A. Yes.

Q. How high does that extend above the top of the pilothouse—that windbreak?

A. Oh, that is about four feet, I guess; three or four feet—three and a half.

Q. Four feet. How much of that was out of water?

A. Oh, that was right around half, I guess, but it leaned over so it was hard to tell.

Q. That is built on top of the pilothouse, isn't it—this apron or windbreak?

(Testimony of Cyrus C. Christensen.)

A. Yes, sir, that is on top.

Q. Just upon the front of the pilothouse, and that is about four feet high, but there was only about two feet of that railing above water, and that is where the name Melody was written, you think?

A. Well, I think that is where it was; either there or the stern, I don't remember.

Q. Now, wait a minute. Let's get straight on that. Could you or could you not see it from the stern? Stop and think now. If you are not certain, why, say so.

A. Well, I could see a couple of letters on it some place.

Q. Anyway, you saw a couple of them. Well, all right.

A. I mean when I first looked. It has a name on the stern. [120]

Q. Did you hear any conversation between Mr. Wuori by radio telephone and the Coast Guard?

A. I did.

Q. Can you cite the instance that took place about the time of these telephone calls; that is, in reference to why the tow had been undertaken, or was under way, or when it was that he first called that you knew about?

A. Well, he first called when we were around the boat there, before we took any line or anything.

Q. He first put a call for the Coast Guard?

A. Yes.

Q. Before you put lines across?

A. Called the Coast Guards.

(Testimony of Cyrus C. Christensen.)

Q. When was that in reference to the time he discovered the name and could not find the survivors? A. When was that?

Q. Yes; when? A. Well, right after that.

Q. Right after that?

A. Right after that.

Q. Did you hear what Mr. Wuori said to the Coast Guard?

A. Well, he asked them if they knew about any boat being wrecked or capsized.

Q. Did he ask anything about the crews, whether there were any survivors? [121]

A. Yes.

Q. Could you hear their answer?

A. No, I could not. I could hear sometimes.

Q. What?

A. I can hear it sometimes, but sometimes I was standing out by the door there.

Q. But you did hear him ask the Coast Guard about the survivors of the Melody? A. Yes.

Q. And that was before you put any lines on?

A. That was before.

Q. Did you hear any other telephone conversations?

A. I heard him when he called up the C.R.P.A.

Q. What did he tell them, if you remember?

A. Well, he asked them—well, then he asked whose boat it was.

Q. Did Mr. Wuori seem to be concerned about the survivors or this boat?

(Testimony of Cyrus C. Christensen.)

A. Yes. He asked the C.R.P.A., he asked for them——

Q. Mr. Hoglund?

A. Mr. Frank Hoglund, yes. He asked them to call up the Coast Guard board by telephone to find out.

Q. I mean, what was Mr. Wuori's demeanor out there about seeing a ship lying in the water foundered—waterlogged, at least?

A. Well, he asked Frank Hoglund—he said he didn't know [122] whether they were inside yet or what happened to them.

Q. He was really concerned about them, was he?

A. Yes.

Q. Was there considerable talk, or was there any considerable talk, as between a bunch of boys out there, as to what happened?

A. Yes, there was.

Q. All right. Then you took the boat under tow quietly. Did you observe Mr. Syvanen's actions, getting aboard that vessel to pass the line?

A. Did I see it, you say?

Q. Yes, sir. A. Yes.

Q. Did you consider there was any hazard connected with that? A. Yes.

Q. To his place—I mean, to his person, life or limb? A. Yes.

Q. Did you consider there was danger connected with it? A. Yes, there is.

Q. Why? Just explain that to the Court.

A. Why, leaving one boat in that condition at

(Testimony of Cyrus C. Christensen.)

sea, even in leaving one boat to another at sea, I consider not safe exactly, but then going on a boat in that condition, the way I look at it, from the time I first saw it, why, it seemd to be up higher when I first saw it from a distance than when we got up to it; so the condition it was in then, and getting down [123] in that hold there at the stern, why, I wouldn't call that very safe.

Q. You think he was presented and confronted with a real hazard do you? A. What is that?

Q. You think he was confronted with a real hazard there? A. Yes.

Q. That was dangerous? If you had done that yourself you would have considered it was in a position of danger?

A. I offered to do it, but then I knew it was dangerous.

Q. You offered to do it but you knew it was dangerous? A. Yes.

Q. Did Mr. Wuori talk about the danger connected with it in any way? There was some talk about danger, wasn't there?

A. Well, there was some talk about it, but I don't remember.

Q. All right. Do you recall the instance of the Coast Guard about coming up? Just tell the Court briefly about the Triumph and the other boat coming up and making contact.

A. Well, I don't remember. I remember when the crash boat left and——

Q. How long had the crash boat left?

(Testimony of Cyrus C. Christensen.)

A. Not very long; ten or fifteen minutes, I guess.

Q. Did you hear any conversation—I don't know—between the crash boat and Mr. Wuori? Did I ask you that? A. Yes. [124]

Q. You answered that? A. Yes.

Q. All right. You were present there on duty when the two Coast Guard boats showed up. Just tell the Court in your own words just what happened there.

A. When the boats came?

Q. Yes.

A. Well, after the crash boat left we started towing.

Q. Approximately how long had you towed before you had any assistance?

A. Well, I believe we coasted two hours.

Q. And what boat showed up first, the surfboat or the Triumph, if you recall?

A. I wouldn't say. I don't remember which one did.

Q. You remember after that, anyhow, two boats, two Coast Guard boats, showed up and rendered assistance? A. Yes.

Q. By making fast to the tow?

A. One made fast on one side, one made fast on the other side.

Q. Do you know what side the Triumph was on, and what side the——

A. The Triumph was on the right-hand side.

(Testimony of Cyrus C. Christensen.)

Q. All right. What was the next thing that happened?

A. Well, there came another boat, but they didn't take any hand. It followed us in and after it got under way, I don't [125] know; one of us steered the wheel, and I steered a couple of hours, and then a couple of us went down below and went to sleep a while, so I was asleep until we got inside the bar and they came down and woke me up.

Q. What time were you awakened, if you recall? A. At 11:00 o'clock.

Q. What was the occasion for awakening you, if you know?

A. They said they had a line in the wheel.

Q. All right. Did you notice your position at that time?

A. Well, I looked at the light over at Cape Disappointment.

Q. And where were you, in your opinion, in reference to a line drawn across the west ends of the north and south jetty?

A. Well, Cape Disappointment is inside the north jetty and, oh, I would say that would be about—the lines were there about a half a mile or so inside.

Q. Half a mile inside?

A. Inside; all of that.

Q. Then what happened then? When you came on deck what was the situation as you found it?

A. Well, I just woke up then. I know we were fooling around there with the lines and finally got

(Testimony of Cyrus C. Christensen.)

the line out of the water there on the stern and Charlie cut that off, and we handed the other end back to the Triumph; one of them, anyway. I could not see the name, it was pretty dark. It was the one on that side (indicating), though. Then we had to let our [126] cable go and——

Q. Was that cable ever recovered?

A. Not to my knowledge.

Q. Was it attached to the Melody the next morning, or when she arrived in that night?

A. No.

Q. It was gone? A. It was gone then.

Q. Apparently it fouled on the bottom, or something?

A. It was on the Melody, as far as I know, when it let go from the other end.

Q. And it wasn't there when the Melody got in to Coast Guard? A. No.

Q. All right.

A. Then this other boat that had been standing by towed us in right ahead of the other two.

Q. State whether or not it is a fact that you stood by during the time the tow was being completed by the Coast Guard? Do you know anything about that—stayed in the vicinity there to render assistance? A. The Triumph.

Q. The Triumph. Do you know anything about that? Charlie didn't talk to you about what thoughts were in his mind at that time? I mean Mr. Wuori. If you don't know, say so.

A. Well, I can't just remember now. [127]

(Testimony of Cyrus C. Christensen.)

Q. O. K. Do you remember about what time you got in, what time the Triumph, or what time the Stampede, was beached, and what time the Melody was beached?

A. Well, they got on the sand before we did. They were aground before we did, but we got in there first.

Q. You were not very far apart at any time?

A. No. We could see all the time.

Q. Practically together? Were you practically together all the way in?

A. Well, we were just ahead of them. We could see them all the time.

Q. Now the next day was the salmon paraphernali and equipment taken care of? A. What?

Q. What did you boys do the next day in reference to taking care of the property? Did you assist in that work? A. Yes.

Q. What was done?

A. Well, Charlie, and I guess one of the other fellows, got up first kind of early in the morning; I guess it was about daylight; anyway, before I got up; and they were—I don't know what work they were doing around there then, but I know they were up doing some work. You could hear them around there. Then they came in and woke me up just a little before seven and I got up, and then we were getting, a little later [128] than that we were getting the gas pump down there to pump out the hold and had gone up to the Coast Guard and the Coast Guard were along, some of them.

(Testimony of Cyrus C. Christensen.)

Q. Did they have any of the crew of the Melody there assisting in the care, in any respect, of any of the property belonging to the Melody, or its equipment?

A. No, not until about ten o'clock, I guess, there was a couple down and got some clothes.

Q. Came down and got some clothes?

A. I don't know who they were. I saw a couple of fellows come down and get a pair of pants off of the boat.

Q. Was there any work being done at that time? I mean by the crew of the Stampede. Was there any work being done on the Melody by the Stampede's crew at the time that these gentlemen showed up?

A. Yes. We were just about finishing up by that time.

Q. Just about. Did they offer any assistance?

A. Not that I know of.

Q. Did they offer to help you any?

A. I didn't talk to them.

Q. Did they ask you any questions, or anything?

A. No, they didn't ask me any.

Q. How long did they stay?

A. I was up at the Point Adams Packing Company when I saw them down there, or just back from there. [129]

Q. When you went back were they there or were they gone?

A. They were just leaving then.

Q. How long did you see them there? During

(Testimony of Cyrus C. Christensen.)

what period of time were they there when you saw them?

A. I just saw them about five minutes when they were leaving the boat.

Q. Were Mr. Wuori and the rest of the boys still working on the Melody there at the time you got back from Point Adams?

A. Yes. He sent one of the boys up to Point Adams after us.

Q. I mean, when you got back and the crew of the Melody, or these two gentlemen you expect me to believe to be members of the Melody crew,—they were leaving, weren't they? A. Yes.

Q. Was the work at that time completed on the Melody by the members of the crew of the Stampede? In other words, was Charlie and his crew still working?

A. No. We were still working.

Q. That is what I want. Did you accompany the boat, the Melody, from down there up to the cannery? A. I was on the Stampede.

Q. You were still on the Stampede?

A. I was still on the beach.

Mr. Fulton: I guess that is all, isn't it?

Cross Examination

By Mr. Tatum: [130]

Q. Who went with you down to the other cannery to get the skiff? Weren't there two men down at the cannery getting the skiff? A. Yes.

Q. At the time you left had the Melody been

(Testimony of Cyrus C. Christensen.)

completely pumped out, or was there still some work going on?

A. They were still working around there.

Q. So two of the members of the crew of the Stampede were gone at that time? A. Yes.

Q. Then pretty soon a third member of the crew came down and told you not to bring the skiff; isn't that right? A. Yes.

Q. So the only man who was still there helping the Coast Guard was still Mr. Wuori; isn't that right?

A. Well, when he came after us he got back before we did, because he helped pull the skiff back on the dock. We already had it in the water.

Mr. Tatum: That is all.

(Witness excused.)

Mr. Fulton: That is our case, but we would like to reserve the right to maybe fill up some holes in the morning. In other words, we don't want to rest until tomorrow.

The Court: Adjourn until 10:00 o'clock.

(Thereupon, at 4:45 P.M., court was adjourned until tomorrow, Tuesday, October 30, 1945, 10:00 o'clock A.M.) [131]

Tuesday, October 30, 1945,

Court convened at 10:00 o'clock A.M., pursuant to adjournment, and proceedings herein were resumed as follows:

Mr. Fulton: Mr. Christensen.

Mr. Wood: If your Honor please and Counsel: I thought counsel had closed, or would close their case last night, and I had Mr. Webb, of the San Francisco Board of Marine Underwriters here to testify the first thing this morning on the promise I would dismiss him and let him get back to his office. He will testify to the value of his ship.

Mr. Fulton: Absolutely. Just step down, Mr. Christensen. We are excusing you for just a minute and calling another witness.

Mr. Wood: Mr. Webb.

The Clerk: Will you state your name, please.

Mr. Webb: Kenneth Albert Webb.

KENNETH ALBERT WEBB

was thereupon produced as a witness in behalf of the Respondents and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Webb, at present you are the local representative here in Portland of the San Francisco Board of Marine Underwriters, are you not? [132]

A. Yes, sir.

(Testimony of Kenneth Albert Webb.)

Q. And in a very few words tell what your sea experience was prior to your occupying this position?

A. From a wiper up to a chief engineer going to sea; from a chief engineer to a port engineer, to assistant marine superintendent, to co-ordinator in one of the larger repair yards here in Portland, and then with the San Francisco Board of Underwriters.

Q. And as a representative of the San Francisco Board what are in a general way your duties?

A. To value these boats for the interested people that hire us to do it after accidents, and to write up the repair risk, render bids to have that work done and check the bills when they come in to see that they are for payment and properly stated.

Q. And generally to supervise repairs of damaged ships?

A. Yes, sir; to see that the boat is back in its original good condition.

Q. Now in the course of those duties did you have an occasion to make a survey of the Melody?

A. I did.

Q. And before I go into that, what in your opinion was the market value of the Melody just before this accident? A. Twenty thousand dollars.

Q. How much? [133] A. $20,000.00.

Q. $20,000.00. And as a result of this accident what damage was done to her?

A. Her engines were beaten up very badly by

(Testimony of Kenneth Albert Webb.)

water, crankshafts bent, liners broke, to a repair bill of approximately $3300.00. All of the calking was gone out of the boat, the decks were cut, and the house was moved out, and the total to repair her and put her back in good condition was about $7500.00.

The Court: Aside from the engine?

Mr. Wood: No. That is including the engine.

The Witness: Including it.

Q. You might explain to the Court, since there was no collision or impact to the engine, how all this damage could take place to the engine?

A. That engine is a Diesel. It runs with an awful heat. The oil going in there explodes under pressure and creates that heat. This engine was, or this boat was submerged or sunk while the engine was running. The temperature of the ocean water on the Oregon Coast was around 58 degrees. The explosion was about 2000 degrees. Then the engine filled up with water and they came up with a hard impact in the cold water. The cold water in the 50 degrees will not come in contact with the hot engine. The impact from that heat would mean the heat coming up from the engine head with the amount of water in there behind that. [134]

Q. So all damage from the engine was done almost immediately when the salt water hit the engine? A. It was done immediately.

Q. Were there any facilities to repair the engine at Astoria?

A. None that we could use. No, none at all in

(Testimony of Kenneth Albert Webb.)

Astoria. The engine had to come back to the Mack Truck people, the makers of the engine.

Q. At Portland?

A. Yes, at Portland. They sent East for the parts.

Q. I don't know how long the boat remained at Astoria, or how long it was there. It stayed there several days between the time it was beached and the time it was towed up to Portland. But I want to know whether in that intervening delay there of several days, further damage occurred to the engine. In other words, it was insinuated here yesterday that Rustad was remiss in not having something done to the engine down there, and I want to know whether that short delay down there after the vessel was beached in any way incurred the damage or not?

A. It didn't show it when we checked it to piece her up.

Mr. Wood: No. That is all.

Cross Examination

By Mr. Bowerman:

Q. Mr. Webb, how long have you been with the Board of Underwriters?

A. Since January 1st. [135]

Q. Of this year?

A. This year; yes, sir.

Q. And this work you did down there in surveying this vessel, was that a part of your employment with the insurance people? A. Yes, sir.

(Testimony of Kenneth Albert Webb.)

Q. And they are the ones who sent you in there, and you did the job for them?

A. For them, yes, sir.

Q. And they were interested in this matter, so they sent you in to survey it?

A. That is right.

Q. Do you know of any boat similar to this that was sold within this area within this year?

A. That were sold? No, sir. I have nothing to do with the selling of them.

Q. Well, I was wondering if you—you were asked about the market value of the boat, and I wondered if you knew of any sale of a boat similar to this, in a condition such as this was in immediately before it was damaged?

A. My market value there——

Q. You haven't answered my question. If you want to add to it you can.

A. All right. Ask the question.

(The question was read as follows: "Well, I was wondering if you—you were asked about [136] the market value of the boat, and I wondered if you knew of any sale of a boat similar to this, in a condition such as this was in immediately before it was damaged?")

Mr. Bowerman: Or within a reasonable time of the accident? A. A fish boat, no.

Q. Huh? A. Not a fish boat, no.

Q. I don't know as I quite follow you, Mr. Webb. What do you mean by a fish boat?

A. Well, this is a fish boat. I have other dam-

(Testimony of Kenneth Albert Webb.)

ages here on the river, such as towboats that have been on the sea and broke and then we sold them as is.

Q. No. You were asked about the market value of the boat immediately before this accident, as I understood it, and you said $20,000.00; is that right?

A. Yes, that is right.

Q. Now I am seeking to find out whether or not you knew of a sale within, oh, say six months of that time, of a boat as new as this was and substantially the same.

A. I tried to explain that to you when you stopped me. Our market value is figured on the length, the depth and width of the boat, which gives builders the tons, multiplied by a set figure. That gives the actual value of the hull, plus the engine, which is the market value of the engine.

Q. That is an arbitrary rule that somebody has made up, isn't it?

A. That is the rule that is used by all your shippers and all the underwriters throughout the world.

Q. Do you know of any boat that sold similar to this within six months of the date of the accident? A. I do not.

Q. Do you know of any boats that were sold similar to this within six months since the accident? A. No, I don't.

Q. This accident occurred, as I would say, about the beginning of the tuna fishing season; is that right?

(Testimony of Kenneth Albert Webb.)

A. I don't know. I just judge it was, yes.

Q. Yes. As I recall, it was along the latter part of July, wasn't it?

Mr. Fulton: July 25th.

Mr. Bowerman: July 25th.

Mr. Fulton: The 24th.

Mr. Bowerman: The 24th or 25th, that the record shows.

Q. Now do you know anything about the earning power of a boat of this kind the last year?

A. As a surveyor of boats and damages we do not go into the fishing end of it.

Q. No, I am not asking you now as a surveyor. I am just asking you, do you know anything as to the earning power of [138] a boat similar to this, last year, on or after July 24th—I mean this year, on and after July 24th?

A. No, I don't.

Q. And it was a fishing boat, wasn't it?

A. Yes.

Q. And, as you understand, it was out on a fishing voyage when this accident occurred? That is what it was doing out in the ocean, wasn't it?

A. That is the only service, as far as I know. I found the boat at Astoria.

Q. However, that is what the boat was built for, and adapted to, wasn't it? A. Yes.

Q. The boat was new, wasn't it?

A. About eight months old.

Q. And do you have any personal knowledge what that boat cost new?

(Testimony of Kenneth Albert Webb.)

A. I know what it cost. Yes. I quoted that price to you.

Q. Well, that is your rule?

A. I think you will find that is the rule of the shipyards where they were built, too.

Q. Have you investigated to see what the annual pay for that boat is in money? A. No.

Q. Or what he contracted to pay? [139]

A. No.

Q. You don't know anything about that?

A. I didn't go into that, no.

Q. But you assume some shipyard somewhere follows this rule the underwriters have; is that right? A. That is right.

Mr. Wood: It is not the underwriters' rule. It is everybody's rule in the ship business. Isn't that correct?

A. That is right.

Mr. Bowerman: Q. What installations were on the boat that were unnecessary but useful, such as the radio, things of that kind?

A. I didn't understand you.

Q. What was on the boat in the way of radio installations, and other things that cost money and yet are not absolutely necessary perhaps to the operation of the boat?

A. Well, that is a rather technical thing. He had his ship-to-shore radio, and direction finder, and has a safety sea factor that, in my opinion, is necessary.

(Testimony of Kenneth Albert Webb.)

Q. That is necessary. Is there a variety of these things, some costing more than others?

A. There is a variation, the same as any radio, in prices, yes. They will average around seven hundred dollars.

Q. What did this one cost?

A. This one here, I should judge—— [140]

Q. If you don't know I will ask you to say so.

A. I don't know what it cost, no.

Q. And was it a new instrument when it went on there?

A. That I can't answer. I seen the boat in her sunken condition—never before.

Q. Were there two bait tanks on it?

A. There was bait tanks, yes.

Q. What did they cost, such as the ones on this boat? A. I don't know. They vary.

Q. They are not figured into this?

A. They are not figured into the boat at all.

Q. No. But they were there on the boat?

A. At the time of this accident they were there.

Q. Yes. What other installations or instrumentalities were on this boat that were not figured into this cubic foot formula you have?

A. Oh, there would be your bait tank, that fishing net, seine, and such fishing gear, you know, as used to fish with. That is not figured in on the value of the boat.

Q. Was it necessary to install those engine repairs here, or could they have been done at Astoria?

A. They could have been done at Astoria about

(Testimony of Kenneth Albert Webb.)
three months later. That is, the boat could have been done and the engine would have been sent to Portland to the Mack Truck people by truck. [141]

Q. Well, doesn't anyone install or repair these engines except the Mack Truck?

A. They can be, yes, but most of the owners demand——

Q. What?

A. They can be, but most of the owners demand that they do it.

Q. They have an engine plant at Astoria—the Mack Truck people do?

A. Not that I know of.

Q. Did you inquire to see?

A. I had Anderson Fish Cannery inquire, and Mr. Cherry inquire.

Mr. Bowerman: I move to strike that out, and I ask you whether you inquired from the Mack Truck Company.

A. No, I didn't inquire.

Mr. Bowerman: Your Honor, I would like to ask that the answer be stricken.

Mr. Wood: I oppose the striking. He shows that the cost undoubtedly was to be paid on his behalf.

The Court: It may remain in, subject to the motion.

Mr. Bowerman: Q. What did he do—take this engine out and put in a new one?

A. Took this engine out, took it to the Mack

(Testimony of Kenneth Albert Webb.)

Truck people and they rebuilt it and brought it back to the shipyard.

Q. That was done here in Portland?

A. Yes, sir.

Q. Did you say that you estimated the damage at $7500.00, or [142] that is what it cost?

A. I estimated the damage, when I called my people, at $10,000. The actual bill on the job, when she was up for everything—this was everything that I could possibly attribute to it—was $7707.24.

Q. Now was that due to some new installation?

A. That was all due to the tow bill and the wages for the man that was representing the owner when that work was going on.

Q. The owner had a man there while the work was going on?

A. Yes, to take care of his interest.

Q. And the work was contracted out by the insurance company?

A. No, never. The work is always contracted out by the owner and when the prices have come in the insurance representative will either O.K. or reject, but the owner has the privilege to go ahead with it regardless.

Q. Well, what was actually paid, and who paid it, for this damage?

A. The actual bill on this——

Q. I asked you what was paid?

A. That I don't know, because I never saw the checks. I wrote out an account and wrote this wreck up and sent it off to the interested people.

(Testimony of Kenneth Albert Webb.)

Q. That would be the insurance company?

A. Yes.

Q. And the bill was the amount you have given?

A. Yes, sir. That was all of the bills added together.

Q. And was there damage to the bait tank?

A. The bait tank I wasn't interested in. If there was any damage on there there was no bill showed for that. There are certain things that we struck out that we will not handle at all, if they are not right with the part of the boat that we are interested in.

Q. Well, you mean it is not insured, or what?

A. Yes; like the gears, the bait tanks, and things like that.

Q. By the gears you mean the fishing tanks and things like that? They are not insured?

A. Yes, sir, that is right.

Q. Have you the time there that was put in to recalk the boat, the hours?

A. No, I haven't with me, but that can be got, I presume.

Q. Mr. Webb, is it, or is it not, a fact that included in this bill is a substantial amount of money for addition to the weight of the keel so the boat would be more stable and would not tip over?

A. No, I should say not.

Q. What? A. Under no consideration, no.

Q. That is not in the bill?

A. That is not.

Q. You know? [144] A. Yes, I do.

(Testimony of Kenneth Albert Webb.)

Q. Was that a separate item?

A. That is a separate item of the owner.

Q. How long would it take you to furnish us an itemized statement of the items that make up your estimate of damage?

Mr. Wood: I think you can state it right now, couldn't you, Mr. Webb?

Mr. Bowerman: I would like to see the items.

A. It would take you long enough to call up Kern & Kibbe and ask them for it.

Q. Well, I think you would have to tell them to let me have it. I don't think they would furnish it to me without your orders. At least, I would not want to ask them to.

A. I don't know whether that is within my power, unless there is an order out.

The Court: Well, I will make the order. You go get it. You can phone to the office now and get it and go on with the case. Step down and go to the telephone around here.

Mr. Bowerman: Mr. Webb?

The Court: Yes.

Mr. Wood: May he use your telephone?

The Court: Yes. Take him in my chambers and shut the door. Get him a pencil and paper.

(Witness excused.) [145]

The Court: Call your witness, Mr. Fulton.

Mr. Fulton: Mr. Christensen.

CYRUS C. CHRISTENSEN,

was thereupon recalled as a witness in behalf of the Libelants and, having been previously sworn, further testified as follows:

Direct Examination

By Mr. Fulton:

Q. How long have you been familiar with and navigated the waters in the Pacific Ocean in the vicinity of the Columbia River?

A. Well, practically all my life. I was born down there at Astoria?

Q. Have you deep sea boated? A. Sir?

Q. Have you been deep sea navigating?

A. Yes.

Q. How long is that?

A. Well, I have had—the last time I have had my own boat four years, and before that—well, quite a few years ago I had my own boat; maybe about fifteen years ago I had a boat there for a few years, too, of my own.

Q. Just tell the Court how many years' experience you have had in deep sea fishing out of the Columbia River.

A. Well, there were times I didn't have my own boat. I have been fishing off and on with other boats practically all my [146] life.

Q. The record don't show how old you are. Now please tell us in years, Mr. Christensen. Approximately twenty years or what?

A. Well, I would say twenty years. I will say more than that. I am forty-three years old.

(Testimony of Cyrus C. Christensen.)

Q. How old were you when you started going to sea?

A. About ten years old, I guess; I used to go out with my dad trolling.

Q. All right. Are you familiar with the sets of the currents on Peacock Spit, and so forth and so on? A. Well, I know the Spit quite well.

Q. What is the fact? What way does the current set there, if you know?

A. Well, on different times of the year it sets in different.

Q. Say in July, the 25th, 1945?

A. Well, on the different tides? On the south side it is running, on the south jetty it usually runs more south there, but then right out in the river it usually goes out west.

Q. Isn't there a northern set there?

A. Yes; there is on the north side, through Peacock Spit.

Q. And you say you have been familiar with these waters ever since you were about ten years old? A. I have.

Q. Do you consider it—in your opinion is it a hazard to bring in a sunken vessel or a foundered vessel, a water-logged [147] vessel, whichever may be the proper word to use in reference to describing the condition of the Melody, to tow that in from the sea into the Columbia River at night, with three vessels in the tow? Do you consider there is any hazard in connection with that tow?

A. Yes, there is.

(Testimony of Cyrus C. Christensen.)

Q. Now just in your own words tell the Court in your opinion what hazards are presented, both to the salvaged vessels and the salvors themselves?

A. Well, of course it all depends on the weather, too, but a boat in a sunken condition might go clear down. Usually most boats when they sink or fill up with water they will usually go to the bottom. Well, when a boat is towing one, having a line on it, it might still sink, and then you have a line on there and it might pull the other boat under—the boat that is towing.

Q. In other words, it is your thought that if the Melody had sunk out there there would have been an opportunity, or a possibility of it fouling your wheel?

Mr. Wood: No, he hasn't said that at all.

Mr. Fulton: Q. Is that what you mean?

Mr. Wood: I object to that question. It is most leading. He has not said that, or intimated it.

Mr. Fulton: Well, that question may be subject to that objection. [148]

Q. What, in your opinion, are the possibilities that might happen in the event the Melody would sink in the vicinity of the waters of Peacock Spit there? What are some of the possibilities happening?

A. Well, most boats in that condition do sink.

Q. Yes.

A. My boat would sink if it filled up with water.

Q. I know, but I say what, if that Melody had sunk coming in there in that vicinity of the waters

(Testimony of Cyrus C. Christensen.)

of Peacock Spit at night, under conditions of the incoming tide—you see there is a northern set there—what if the Melody had sunk? Would there be a possibility of the wheel of some of the salvaged vessels being found getting into difficulty?

A. Well, the line would pull down and the boat towing would have that line connected to that boat and you can't always tell what would happen. That is hard to say.

Q. Were there any other hazards that you can conceive of? A. You mean in towing?

Q. Yes; bringing the tow into the Columbia River from outside, passing the water of Peacock Spit. I am just asking you if there are any hazards there—if you consider them as any hazards in making the tow at the time.

A. Well, at that time you had to figure out the tide and keep off of the breakers, and so forth. If you don't, why, you go into them. [149]

Q. All right, Mr. Christensen. Mr. Christensen, did I ask you whether or not in your opinion—ask you whether or not the Melody sunk any lower in the water from the time you arrived there and the time you left? A. It looked like it, yes.

Q. What did you say?

A. I say, it looked like it from a distance, before we got up to it.

Q. But I mean after you got alongside of the Melody, got close enough to actually observe the actual condition, and the time you left with the tow or got the tow under way, in your opinion did the

(Testimony of Cyrus C. Christensen.)

Melody settle any lower in the water? That is the point.

A. I didn't notice after we got there, but on the way out I did.

Mr. Fulton: That is all.

Cross Examination

By Mr. Wood:

Q. You were actually on the Stampede II, weren't you? A. Yes.

Q. You are one of the Libelants in this case?

A. Yes, sir.

Q. What was the actual condition of the weather and tide when you got to the Melody?

A. It was an ebb tide.

Q. Half ebb, wasn't it? [150] A. Yes.

Q. A smooth tide? A. Quite smooth.

Q. How was the breeze, if any?

A. Oh, it wasn't blowing very hard.

Q. No. Now how long after that did the tide change?

A. Oh, I would say about three hours.

Q. That would be about six o'clock, then? It would be about slack tide, would it? A. Yes.

Q. And that is when you were doing your towing, isn't it? A. Yes.

Q. And at slack tide with no particular wind there is no appreciable strong set toward Peacock Spit, is there?

A. Well, there is always a current out there.

Q. I have been in cases with wrecks down there before this. The strong set toward Peacock Spit

(Testimony of Cyrus C. Christensen.)

is on an ebb tide when there has been a northerly wind blowing up the Coast for a couple of days; isn't that so? A. What is it?

Mr. Wood: Read it to him.

The Witness: Well, there wasn't any northerly wind.

Q. I mean the wind blowing from the south towards the north.

A. Well, you don't call that a northerly wind.

Q. Well, I used the wrong word then. When the wind is blowing, [151] say, from the southwest.

A. Well, then that is a southwest wind.

Q. A southwest; that is right; and it sets up a current up the Coast, doesn't it?

A. Wind don't set up current.

Q. You don't agree with that?

A. No.

Q. Well, I think you are wrong on that. Anyway, when a southwest wind is prevailing and an ebb tide, that is when the set toward Peacock Spit is strong; isn't that true?

A. The wind don't set the tide any.

Q. Isn't that true? Answer the question.

A. I still don't get your question.

Q. Well, I will ask you again. On an ebb tide and a southwest wind, especially if it has been blowing for a couple of days——— A. Yes.

Q. ——that is when you get the strong set toward Peacock Spit, isn't it?

A. Why, up on top of the water, yes.

(Testimony of Cyrus C. Christensen.)

Q. Well, do you get any strong set toward Peacock Spit at a slack tide with no wind?

A. Oh, there is still a little tide in there.

Q. I am asking you about a set toward Peacock Spit. Is there any appreciable strong set toward Peacock Spit when the tide is slack and there is no wind? [152]

A. There is still tide in there, yes.

Q. I am not talking about tide; I am talking about the set toward the Spit. Can't you answer that question?

A. I still don't quite understand you.

Mr. Wood: All right. You can't answer it?

The Witness: No.

The Court: That is all.

Mr. Wood: That is all.

(Witness excused.)

Mr. Fulton: Mr. Webb may come back.

KENNETH ALBERT WEBB,

was thereupon recalled as a witness in behalf of the Respondents and, having been previously sworn, further testified as follows:

Further Cross Examination

By Mr. Bowerman:

Q. You have the itemized statement of the items entering into your estimate of damage?

A. The owner of the shipyard will have the itemized statements up in my office sometime today.

(Testimony of Kenneth Albert Webb.)

I have his total bill here now, the figures on that, but I could not write his itemized statement in there very well without a stenographer or somebody to take it.

Mr. Bowerman: Well, until that is here I guess, your Honor, there is no use to continue with the witness. But you will [153] bring it up when you get it?

A. Yes. You can have it if I am not here. If I am not in town I will have it sent up when I get it.

Q. Are you going out of town today?

A. I expect to go down to that Oregon Shipyard just the minute I get away from here. I have got an awful big loss down there by fire.

Q. Well, I don't want to interfere with anyone's business unnecessarily.

A. Well, the total bill, if it will help you, and this includes the engine, you know, and all the bills the shipyard paid, is $6164.45.

Q. Six thousand one hundred——

A. And sixty-four point forty-five.

Q. Sixty-four forty-five.

A. That includes the hauling out, belt A, launching, and nails paid, and repair bill on the engine, and calking and everything else.

Mr. Wood: What makes up the difference between that and the $7500?

A. You have the tow bill, $234——

Mr. Bowerman: Q. How much was the tow bill?

The Court: Go slow.

(Testimony of Kenneth Albert Webb.)

A. The tow bill is $234.21.

Mr. Bowerman: Q. That is Mr. Cherry's company? [154] A. Yes, sir.

Mr. Bowerman: O.K

The Witness: The ones for supervision $257.

Mr. Wood: That is that item you spoke of as owners' wages before?

A. Yes, they represent the owner. Radio Laboratories $14.62. E. Beebe $66.60.

Mr. Bowerman: What was that, do you remember?

A. I don't know. I would not have any idea until I looked it over, and it seems as though it was Columbia River Salmon, miscellaneous; that is, telephones and so on, and garage $146.37.

Mr. Bowerman: Thirty-seven?

A. Yes, sir. The bill, to help you separate that from the Mack Truck and other miscellaneous bills on the bilge pump and fire pump, amounted to $3314.22. That should be subtracted from the bill of $6164.

Q. Did you say fire pump and bilge pump?

A. It is fire and bilge pump, yes; miscellaneous pumps they have there on the boat, gasoline pumps.

Q. I don't think I quite followed you, Mr. Webb. Tell me that over again. I don't get the significance of it.

A. I said the Mack Truck Company, and the other miscellaneous bills on other engines, which is bilge pump and blige or bait pump, fire pump,

(Testimony of Kenneth Albert Webb.)

whichever you want to call it, and that [155] amounted to three thousand three hundred——

Q. Three thousand three hundred and what?

A. And fourten dollars and twenty-two cents. That is to be deducted from Kern & Kibbe's bill of six thousand some odd dollars, because Kern & Kibbe shipyard paid for it.

Q. This would be due to the shippers and——

A. Just to machinery and the equipment, yes.

Q. Yes; machinery and the engine, the pumps, and the like of that? A. Yes.

The Court: Make all that?

Mr. Bowerman: Make all that.

The Court: And that is their bill to Kern & Kibbe?

Mr. Bowerman: Yes.

Q. How much of that is for damage to the engine?

A. You want me to give it to you from recollection, without the figures? Q. Yes.

A. It is a little over $1800 to the engine alone. That is to be checked later.

Q. Well, in your opinion, that is substantially correct? A. Yes, sir.

The Court: Did you finish with that difference between the sixty-one hundred and the seventy-five hundred? You didn't get all of those items in that made up that? [156]

A. I think so, sir. I think they are all in there. I am not sure.

(Testimony of Kenneth Albert Webb.)

The Court: There is fourteen hundred dollars there.

A. Oh, that might be on, well, I don't know. Then one is probably on the radio, direction finder, and the like of that.

The Court: What did those items total, so long as we are getting up to it? What did those items total? Roughly you gave them there. It sounded to me like they were under a thousand dollars. One was $234.

A. No. They total $7527.24, according to my figures.

The Court: Check. I am talking about the $1400, the difference between Kern & Kibbe's bill, and the——

A. Oh, between the thirty-three fourteen and the sixty-one sixty-four?

The Court: No.

Mr. Wood: I think, your Honor, part of the apparent discrepancy is in the Beebe Company's bill. I think the witness said something about sixty-six dollars.

The Witness: $666.50.

Mr. Wood: Oh, six hundred sixty-six? It didn't sound like that over here.

Mr. Bowerman: I have got sixty-six. That makes up a lot of the difference. That brings it up to——

The Court: That does it.

The Witness: The total amount is $7527.24.

Mr. Bowerman: No. We were—I was, at least,

(Testimony of Kenneth Albert Webb.)

trying to get the difference between Kern & Kibbe's $6164.45 and $7500, or whatever it was. How much did you say you make all of those bills?

A. $7527.24.

Q. Total. What was it you said that Columbia River Salmon Company's bill was for?

A. Oh, there was telephoning in there, and garage, and I would have to look over the books to get all of that myself.

Q. Now did you ever pay Mr. Wuori for phoning in from out in the ocean there, some bill for telephoning? A. Sir?

Q. I ask you if you ever paid Mr. Wuori for some telephoning he did when he was out in the ocean bringing this boat in?

A. I have had nothing to do with this boat until I seen it——

Q. You are not answering the question.

A. Yes; I am trying to answer it.

Q. I asked you if you ever paid Mr. Wuori.

A. I don't know Mr. Wuori.

Q. Did you have to pay any expenses for bringing the boat in?

A. I wasn't interested in the boat until I found her at the dock at Astoria. That is where my interest took place.

Q. Just answer the question. Did you investigate at all to see whether there was any expense in bringing it in from the ocean? [158] A. No.

Q. Or who brought it in? A. No.

Q. You just started with the boat at the dock?

(Testimony of Kenneth Albert Webb.)

A. I started with the boat at the dock.

Q. Yes. If the boat had stayed out in the ocean you would have had to bring it in?

A. If the boat had remained in the ocean I would have declared her a total destructive loss and it would have been a lot easier for me.

Q. Yes; and then you would have paid the full policy? A. Yes.

Mr. Bowerman: That is all.

Mr. Wood: You have to get these bills and bring them in——

The Court: This is enough detail, isn't it? This is all detail?

Mr. Bowerman: I would like to ask one more question.

The Court: I mean, you don't have to hold him up any longer, do you? This is enough detail.

Mr. Bowermna: If counsel is willing, and it will accommodate the witness, I will be glad to take Kern & Kibbe's figures.

The Court: Yes. Do we have to write it up?

Mr. Bowerman: I will ask one question.

The Court: Aside from that, one question——

Mr. Bowerman: I am willing. [159]

The Court: He can go back without writing it up?

Mr. Bowerman: I would like him to confirm the figures.

The Court: All right. But he won't have to stay?

Mr. Bowerman: No, he won't have to stay.

(Testimony of Kenneth Albert Webb.)

Mr. Wood: You go ahead.

Mr. Bowerman: Q. You say the defendant's vessel was worth $20,000, according to your formula?

A. Yes, sir.

Q. And that is what you insured it for?

A. As the underwriter's surveyor I do not know what the boat is insured for. As the surveyor——

Q. Do you know, Mr. Webb, what the policy was for? A. I have never seen the policy.

Q. Don't you know, as a matter of fact, what the policy was?

A. From the owner I do, yes, but that is——

Q. Yes; and the policy was just exactly what you say the boat was worth, wasn't it?

A. I don't think so. I think it is under that.

Q. How much?

Mr. Wood: The owner will testify to that.

Mr. Bowerman: O.K.

Mr. Wood: It is hearsay, so far as the witness is concerned.

The Witness: It is only lip service.

The Court: Now you go on.

The Witness: Where do you want me to send that? [160]

The Court: To the Clerk.

The Witness: To the Clerk of the Federal Court. All right. I will get somebody to bring it up. You can pick it up at my office and bring it over.

The Court: Mr. Webb, we all thank you. I haven't seen you for some time.

The Witness: No, you haven't.

(Testimony of Kenneth Albert Webb.)

The Court: Hurry up, Mr. Fulton. I want to hear the other side of this.

Mr. Fulton: Pardon me.

The Court: I say, hurry up.

Mr. Fulton: O. K.

(Witness excused.)

CHARLES WUORI,

one of the Libelants, was thereupon recalled as a witness in behalf of the Libelants and, having been previously sworn, further testified as follows:

Direct Examination

By Mr. Fulton:

Q. Mr. Wuori, in your libel please explain to the Judge the position of Peacock Spit? Are you pretty familiar with that area in there?

The Court: What area?

Mr. Fulton: Peacock Spit.

The Court: Well, I am, and everybody else is. I went [161] down on the Harvest Queen.

Mr. Fulton: Q. In your own words, Mr. Wuori, explain the habits of Peacock Spit in reference to bringing the tide in there at high tide currents, possibilities of hazards. You might or you might not explain that to the Court.

A. Peacock Spit is situated on the north side of the Columbia River channel. That is north when you enter from the lightship to the jetties.

Q. Is it west of the west end of the jetty, or how does it lie in reference to the jetty?

(Testimony of Charles Wuori.)

A. It is parallel to the channel. The channel is practically southwest and northeast.

Q. I mean this Peacock Spit, is that west of the jetty?

A. Well, it starts from the jetties and then it runs as far as No. 1, a west southwesterly direction.

Q. How large an area is it east and west?

A. East and west?

Q. The approximate length of it?

A. Oh, well, offhand I would say three or four square miles.

Q. Is that a dangerous area? A. Yes, sir.

Q. Just explain why it is dangerous.

A. Well, anybody knows, who knows the history of the marine navigation, knows there has been hundreds of ships sunk on the Peacock Spit in the rough seas and many lives lost. [162]

Q. And what peculiar hazard is there, currents on anything that causes that, or what?

A. The currents always set, regardless of tide, westerly and northerly.

Q. Northerly and westerly?

A. That is on the north side of the channel. On the south side it stays southerly.

Q. Coming in there at night? A. Yes.

Q. How far did you pass off Peacock Spit at the time of that, approximately?

A. When we came right in the channel we managed to miss Peacock Spit entirely. We kept Peacock Spit, oh, west—west or north side—the west northwest, when we entered into the channel.

(Testimony of Charles Wuori.)

Q. What possible hazards would there be in the event the Melody had sunk right in that area?

A. Well, if we had sunk just of a sudden we might not have been able to have released our tow-lines soon enough. They might have been hit at the banks or whistler buoys——

Q. Suppose your line——

A. ——which has happened at several times, even if the wheel didn't have anything on it at all.

Q. Well, what would happen if the wheel had fouled—I mean if the Melody sank and was unable to release your line on account [163] of the wheel fouling, or anything else, what was the possibility of happening?

A. Well, there is a possibility we might have drifted on the Spit, through Peacock Spit, which at the time was rough but at the night time you can't tell if it is rough or not.

Q. Well, all right.

A. Without the practice for this we might have drifted on the banks, and so forth.

Q. Get back to the fishing catch and the value, and your loss in fish. Can you tell the Judge, in your own words, what, in your opinion, was the cost to you in lost fish by virtue of being held up, making this tow and making your repairs afterwards? Just tell the Judge in your own words about that.

A. We lost at the time fishing—we had lost time fishing—we lost about—we could have made—well,

(Testimony of Charles Wuori.)

the time we lost we could have made about a trip and a half.

Q. What is a trip and a half worth to you?

A. Well, the trip shortly after we towed the Melody, and that is the first trip we had, about three thousand dollars.

Q. What would a trip and a half be worth? What would be a fair estimate of a trip and a half?

A. About $5000.

Q. About $5000? A. Yes.

Q. What cost and expense were you put to by virtue of making [164] this salvage?

A. I can't remember until I look on the book, but I think there may be three and a half to four hundred dollars.

Q. That includes your cable? A. Yes.

Q. And you have got it itemized?

A. I have got it all itemized, yes.

Q. You say the value of the Stampede was thirty-five thousand?

A. Yes. I could have got thirty-five thousand in there after the fishing season for her.

Q. You have had her valued? A. Yes.

Q. Since the accident?

A. No. It was before, I think.

Q. All right. The vessel you say was worth thirty-five thousand, and you were offered that?

A. But my vessel is only twenty-one tons and the Melody was twenty-five net tons.

Q. Was the Melody in your opinion a more valuable boat than yours?

(Testimony of Charles Wuori.)

A. According to the tonnage it is.

Q. Yes. Well, I am asking you, as a matter of fact, is it is heavy construction, and so forth?

A. I think so.

Q. Just as good a boat as yours? [165]

A. Yes, sir.

Q. Newer, besides? A. Newer, yes.

Q. Now, taking into consideration the hazard to your vessel, and your equipment, and your loss, and injury to your person, what would you say would be a fair share of the value of the Melody to compensate you and your members of your crew for the services you performed?

A. I consider one-third of its full valuation.

Q. You figure that, you mean, in addition?

A. In addition to what we lost for fishing and the cargo which we lost, to replace.

Q. In other words, putting a leading question, one-third you figure that should be awarded to you—the libelants here—for the hazards they took, in addition to their loss of fishing? A. Yes.

Mr. Fulton: That is all, your Honor.

Cross Examination

By Mr. Wood:

Q. How long was your towline? One hundred fathoms, you said, didn't you?

A. Well, with three hundred fathoms apiece, and there was two of them. We lost one.

Q. How much of your line did you have out?

A. We lost one. [166]

(Testimony of Charles Wuori.)

Q. No, no. When you were towing the Melody how much line did you have out?

A. Approximately one hundred fathoms. I could not tell what.

Q. It was hemp line, wasn't it?

A. It was plow steel half-inch line.

Q. Half-inch line. How long was your ship? Wasn't it fifty feet over all?

A. Fifty feet over all.

Q. The Melody was only forty-six feet, wasn't it? A. May I ask you something?

Q. What?

A. What do you mean? You get these figures off of the documents, or you go into over-all length?

Mr. Wood: Never mind. I won't go into that. I will go into that by another witness. That is all.

(Witness excused.)

Mr. Fulton: That is our case, your Honor.

RESPONDENTS' EVIDENCE

The Clerk: What is your name, please?

Mr. Rustad: Thomas Rustad.

THOMAS RUSTAD,

the Respondent, was thereupon produced as a witness in behalf of the Respondents and, having been first duly sworn, testified as follows: [167]

Direct Examination

By Mr. Wood:

Q. Mr. Rustad, you are the owner of the Melody, aren't you? A. Yes, sir.

(Testimony of Thomas Rustad.)

Q. Your home is up in Alaska some place, is it not? A. Yes, sir.

Q. What town?

A. Petersburg, Alaska.

Q. And you had had the Melody built only during this last year, had you not? A. Yes, sir.

Q. In what yard was she built?

A. Chambers Boat Company, in Seattle.

Q. She was a new boat, wasn't she?

A. Yes, sir.

Q. What did you pay for her?

A. All? Over all, or do you mean——

Q. Everything.

A. Everything? That was twenty thousand would cover it.

Q. You showed me just now—I will pass it up to you—your contract with the yard for the hull. Have you any reason for keeping that? If not, I might introduce it in evidence.

A. Well, I would like to have it back.

The Court: He can have it back later.

Mr. Wood: Well, all right. I will introduce it in evidence. [168] It is a contract for the construction of the hull, isn't it?

A. Yes, sir, the completed hull.

Q. What?

A. The completed hull, without the engine.

The Court: It is admitted.

Mr. Wood: Q. And it shows what price for the hull?

A. Yes, sir.

(Testimony of Thomas Rustad.)

Q. What price?

A. Ten thousand seven hundred.

The Court: Let's get it marked, please. He will give it right back to you.

(The contract so offered was thereupon marked Respondents' Exhibit 3.)

RESPONDENTS' EXHIBIT No. 3

January 1, 1945.
Seattle, Wash.

This is to constitute an agreement between The Chambers Boat Co., contractor, and Thomas B. Rustad, purchaser, for the construction of a forty-six (46) foot trolling boat according to specifications as drawn up by Edwin Monk, architect, and for an agreed price of $10,700.00, which is to be paid by purchaser in accordance with the following schedule:

First at date of signing contract.....$2,500.00
Second, at completion of framing of vessel..$3,200.00
Third, at completion of planking of vessel..$2,500.00
Fourth, at date of acceptance of vessel by purchaser $2,500.00

THOMAS B. RUSTAD,
Purchaser.

CHAMBERS BOAT CO.,
Contractor.

By JAMES G. CHAMBERS,
Partner.

(Testimony of Thomas Rustad.)

Kern [Cut] Kibbe
Telephone: University 3685
8607 N. Bradford Street, Portland 3, Oregon
August 22nd, 1945

Tom Rustad to Kern & Kibbe

Repairs to D. V. "Melody" at our boat and barge yard in St. Johns as per letter of authorization from Robert O. Fleming Company and instructions of Mr. Webb:

Haul out	$ 47.00
Lay time	140.00
Labor	2,380.30
Crane rental	36.52
Service truck rental	48.00
Oakum	9.75
Cement	2.50
Plywood	1.50
Canvas	1.25
Lumber	2.70
Hardware, nails, etc.	15.00

The following invoices paid by us

Mack International Truck Co.	
(Repairs to engine)	$1,854.64
(Repairs to instruments)	66.55
Oregon Marine Supply Co.	
(Compass, flares, etc.)	44.45
(paint)	46.17
R. R. Poppleton	
(Repairs to electric motor)	19.08
(Repairs to generator engine)	12.83
(Repairs to generator and motor)	64.31
(Repairs to pump motor, etc.)	56.50
M. Parks (maps)	18.25
Dohrman Hotel Supply Co. (dishes)	12.01
A. Anderson (Pots, pans and misc.)	21.53
W. N. Burley (Lettering on boat)	9.00
Carbon Dioxide Extingisher Co.	
(Repair extinguishers)	5.50
Enterprise Planing Mill (new door)	10.75

(Testimony of Thomas Rustad.)

W. R. Grasle Co. (complete overhaul of all electric wiring and apparatus, new batteries, etc.)	969.53	
Union Oil Co. (fuel and grease)	49.88	
(fuel)	53.24	$3,314.22
Add 5% handling charge on $3,314.22		$ 165.71
Total		$6,164.45

Mr. Wood: Q. Ten thousand seven hundred for the hull, and how much did the engine cost?

A. Fifty-six hundred installed.

Q. Then what is the difference between those two figures and the twenty thousand? How is that made up?

A. That makes up for the radio, the photoelectric pilot and all accessories, miscellaneous aboard the boat.

Q. So the total cost to you of the boat and her accessories was $20,000? A. Yes, sir.

Q. There were some, and I don't know that it makes a lot of difference but there was some question asked of Mr. Webb, which [169] he could not answer, and what was the amount of the insurance on her? You must know that. What was it?

A. Twenty thousand.

Q. Twenty thousand. Insured for her full value?

A. For her full value.

The Court: He paid twenty thousand for everything. The insurance covers something less than that?

(Testimony of Thomas Rustad.)

Mr. Wood: I guess that is right, yes.

Q. On this trip on which the disaster occurred, was that your maiden voyage on this boat?

A. Yes, sir, maiden fishing voyage.

Q. Yes. And where were you in the ocean when the boat tipped over?

A. I estimated approximately six miles off of north headlight.

Q. Which direction, due west or north?

A. Due west.

Q. Which way? A. Due west.

Q. Due west. What was the condition of the sea and weather when you went over——

A. I would say moderate.

Q. ——on the coast her and tipped over?

A. As far as I can determine, and from what I could gather from the two fellows on watch, we evidently struck a tide rip.

Mr. Bowerman: Struck a what? [170]

A. A tide rip.

Mr. Wood: Q. A tide rip?

A. And in which we encountered a freak wave, which I don't know if all of you know what it is. It is two waves at once, the first one hitting us and listing us over to the starboard side and the second following and tilting us still further, and then from there on she just continued.

Q. About what time of day was this?

A. My watch had stopped at ten minutes to one.

Q. This was July 24th? A. 24th.

Q. You had left Astoria on the 22nd, hadn't you?

(Testimony of Thomas Rustad.)

A. Yes, sir.

Q. Now when she tipped over what did you men do, you and your crew?

A. Well, as to the other fellows, I have no idea what they did. Myself, I was in the galley with the cook, and he is the only one that I could tell what he did. He stepped through the door but she was——

Q. I don't mean all that in detail. I mean, you and your crew left the ship, didn't you?

A. Yes, sir. That is, we got into our life raft.

Q. That is what I mean; rubber life raft?

A. Yes, sir.

Q. And what direction was the wind blowing from, such as [171] there was?

A. It was a light southwest breeze.

Q. And the tide was made? A. Half ebb.

Q. That would be flowing still out to sea?

A. Yes, sir.

Q. And what was the result of the wind and tide in separating you from the Melody?

A. Being as the wind was from the southwest and the tide setting out to sea, it blew us away; that is, separated the two of us; that is, the boat and the crew from each other.

Q. How far did you become separated, do you think?

A. You mean when we finally were picked up?

Q. Yes. A. A mile and a half, I judged.

Q. After you had become separated and found you could not get back to her, then you determined,

(Testimony of Thomas Rustad.)

I understand, to go and seek assistance from the Coast Guard, didn't you? A. Yes, sir.

Q. Now how long after the capsizing was it that you were picked up by the Coast Guard boat?

A. Approximately two and a half hours.

Q. And was that the boat known as the crash boat? A. Yes, sir.

Q. And when they picked you up what did you do then with them? [172]

A. We proceeded immediately back to the Melody.

Q. And what did you find when you got back there? Before I ask you that question, how long did it take you to get back to the Melody in the crash boat?

A. I would estimate about two to three minutes.

Q. Oh, as fast as that? Well then, if I have computed the time right, you were back at the Melody between two and a half and three hours after the capsizing? A. Yes, sir.

Q. Then what did you find when you got to the Melody?

A. We found the Stampede, the boat which we know was there in the first place. We found her with a line attached to the Melody.

Q. How did you know she was there in the first place? A. We could see her.

Q. Oh, you could see her from your life raft?

A. Yes, sir.

Q. Oh, I see. I didn't wnow that. Anyway,

(Testimony of Thomas Rustad.)

when you got over there you found the Stampede with a line aboard your boat? A. Yes, sir.

Q. And what was the attitude of Wuori about keeping hold of her, accepting assistance from you, or what was he going to do?

Mr. Bowerman: Just a moment. If your Honor please, that is calling for a conclusion. I suggest the propriety of asking him what happened or what was said. [173]

The Court: He may give the details.

Mr. Wood: Q. What was Mr. Wuori's attitude?

Mr. Bowerman: I object to that as calling for a conclusion.

The Court: He may give the detail, tell what was said back and forth.

A. There wasn't much said at all, as we could tell, when he first came up there, that it was evident that the Stampede was intent on salvage.

The Court: Now wait.

Mr. Fulton: Strike that out.

The Court: Wait a minute now. You don't need to take time to do that. I know how to do that. We want to know what was said. We don't want to know what was thought and how things looked.

The Witness: Yes, sir.

Mr. Wood: Q. What was said or done, from which you gathered that opinion?

A. Well, if I can remember very much at all at that time, Mr. Wuori had not said anything at all.

The Court: Did you talk to him?

A. I talked to him with very few words; yes.

(Testimony of Thomas Rustad.)

The Court: He said he didn't know you were on the crash boat?

A. The reason he knew that, or, that is, should have known it, was that the fellow that was with me in the life raft when we [174] removed his man from the Melody told him that he had the skipper aboard the crash boat, and I was the skipper and right alongside the boat at the time.

Mr. Wood: Q. You have just mentioned the time you removed his man. Could you explain that?

A. That was the only thing Mr. Wuori asked us to do, was to take his man off the Melody.

The Court: Mr. Wood wants you, and I want you, to tell, from the time you got up there, from the time you began to talk, who it was and everything that was said, and we will draw the conclusion.

A. Well, when we arrived at the Melody Mr. Wuori asked us to remove his man. I believe Mr. Syvanen also asked—that was the man on the Melody—asked to be taken to the Stampede, which we did, and on arriving——

Q By means of your life raft?

A. By means of our life raft, yes, I and another Coast Guard man. When he arrived at the Stampede he told—this Coast Guardsman told Mr. Wuori he had the crew and the skipper, and that I was the skipper of the Melody. That is all verified, the fact I was the skipper, and Mr. Wuori just said, "Oh."

Q. Did Mr. Wuori offer to turn the boat over to you and the crash boat? A. No, sir.

(Testimony of Thomas Rustad.)

Q. He kept on his preparations for towing, did he? [175] A. Yes, sir.

Q. Did you ever have any intention, when you left the Melody, or at any time, did you ever have any intention of abandoning her? A. No, sir.

Q. Well now, after you got back with the crash boat there and Mr. Wuori had his line aboard your boat, then you and the crash boat departed, didn't you? Or did you leave the scene then?

A. We were there about between a half hour and forty-five minutes.

Q. And then what did you do? Before that did anything else happen during that half hour to forty-five minutes, except what you have told about?

A. Well, yes. Mr. Wuori asked us if we would put whatever you call it, a guard on his rope to help protect it. But we had nothing to put on, so we proceeded back to the crash boat, stood by for about half an hour to forty-five minutes, while the Captain, or the man in charge of the crash boat was calling to the Coast Guard, finding out where they were and how soon they would arrive. In the meantime——

Q Did he get in touch with them?

A. Yes, sir.

Q And they said they were right there by us?

A Yes. [176]

Q. Then what?

A. In the meantime the Stampede prepared to start towing. They had towed for about, oh, five or ten minutes. In the meantime we could see the Coast

(Testimony of Thomas Rustad.)

Guard surfboat approaching. We ran up—we started for shore at that time toward the Point Adams station, and we stopped alongside at one of the surfboats, which I would say was maybe three miles away. I don't know for sure.

Q. Three miles away from where?

A. From the Melody; and they stopped and talked for a moment, and we proceeded on our way to Point Adams and arrived there at five o'clock approximately.

Q. How many Coast Guards came out of the rescue boat—Coast Guard boat? There was a surfboat you passed? A. Yes.

Q. Then there was the Triumph, and what? Were there any others?

A. I believe there was another surfboat Two surfboats and the Triumph.

Q. Now after what o'clock by day—what time was it when you left the scene and know no more about it of your own knowledge?

A. Oh, it must have been between four and four-fifteen.

Q. And at that time the Stampede had been tow-the Melody about ten minutes and the Coast Guard was on its way out; is that correct?

A. I would judge, yes. [177]

The Court: The chafing gear; is that the word?

A. Yes, sir.

Mr. Wood: Q. Have you fished off the river there before?

A. This is my first year.

(Testimony of Thomas Rustad.)

The Court: I would like to know a little more about his life.

Mr. Wood: I would, too. Let's ask him about it.

Q. What has been your life then prior to this fishing venture? A. Fisherman.

Q. Where?

A. In Alaskan waters, Puget Sound.

Q. For what kind of fish?

A. Salmon, halibut, black cod; that is, bottom fishing, surface fish of all kinds.

Q. How long have you been doing that?

A. Since 1930.

The Court: Does he know his own boat and gear?

A. Yes, sir.

The Court: About the size of those?

Mr. Wood: I would be glad to have your Honor ask him questions along those lines.

The Court: Well, these are things very puzzling to me here, between these two men out there, old-timers, seafaring men.

Mr. Wood: Yes. [178]

Q. Well, had you owned your own boat before this?

A. Yes, sir. I had another boat in Alaska.

Q. And have you owned more than one boat before this? A. No, sir.

Q. How long did you own this other boat before this one? A. Since 1935.

The Court: What is your age?

A. Thirty-two.

The Court: You have been to school, haven't you?

(Testimony of Thomas Rustad.)

A. Yes, sir.

The Court: To college?

A. Well, no, sir.

Mr. Wood: Q. Where did you go to school?

A. In the State of Washington.

Q. And whereabouts there? Where did you live?

A. At Poulsbo, Washington.

Q. How high did you go through school or college?

A. High school and through business college.

The Court: Have you ever been wrecked before?

A. No, sir.

The Court: You never lost a boat or had anything like this happen? A. No, sir.

The Court: Nor ever been wrecked yourself? I mean, when you had to go out in a small boat? [179]

A No, sir

The Court: You had never been in a marine accident? A. No, sir.

The Court: Were you ever in on the other end of one? Have you ever rescued a party?

A. There has been several instances when we have helped boats out that have been broke down; yes, sir; in general. That is all.

The Court: You know about the rules of the sea generally, of the right to collect ships in tow and make claims for them?

A. We have never bothered with them, sir. We have just helped them out.

The Court: That didn't just answer my question. Maybe you don't know. Maybe you have.

(Testimony of Thomas Rustad.)

A. I just didn't quite understand it.

The Court: That is all right. Mr. Wood.

Mr. Wood: Q. I think the Judge meant, did you know the rule of the sea that entitles a rescue ship to make a salvage claim?

A Well, yes and no. It all depends on whether you abandon the boat or not.

Q. I don't think that is true, but that may be your idea, and then, of course, it may be all right for you to hold it.

A. Marine law is sort of hard to understand.

The Court: Excuse me, sir. You didn't make any protest [180] at what this Wuori was doing? You didn't say anything to him one way or the other. Did you have any reason for that? I can understand you might have been frightened. Anybody would be with what you had just gone through. But you didn't talk to him at all about what you were doing. He had taken hold of your boat. You said you hadn't abandoned it. You didn't approve of what he did. You didn't protest. What was the idea? What was the situation? Did you think the boat was about to sink unless he hung onto her? Did you think it wasn't going to sink or what did you think? Or were you up in the air? That might have been the case.

A. As I said before, we could see very plainly he had only one idea in mind; that was my thoughts; and I could see there wasn't any use of approaching him in any way in telling him we hadn't abandoned the boat. We thought he was wrong. We

(Testimony of Thomas Rustad.)

wanted him to let go and for the crash boat to take over, which they would. That was the principal reason for us getting into our life raft. That was to see if there was a secure place of fastening a line to our boat, and when we could not find any secure place, that is like a cleat or anything substantial to stand a tow of it, we reported that to the skipper and he says, "Well, really there is nothing we can do, as long as the Stampede has a line on it now, unless he asks us to," and that is the reason I never bothered to have any conversation with Mr. Wuori. [181]

The Court: Now you brought it up to a certain point there. The skipper was bashful, and he said unless Wuori asked the lifeboat to take over. Why didn't you then ask Wuori to let go? That is what I don't understand.

A. Well, if you will understand, that is—I don't know. Maybe it is just human nature. You can tell by looking at a person, you can tell what he is figuring on, in the first place, and know his answer before he answers.

Mr. Wood: Q. Well, at any rate, whether you were right or wrong, the reason you didn't protest was because you felt it would be useless?

A. Yes, sir.

Q. Now I will come to the next period about which you have any personal knowledge, and that is after you were ashore. How much fish was aboard the Melody when she was ashore, that was saved? How much fish was saved?

(Testimony of Thomas Rustad.)

A. Seven thousand pounds, three and a half tons.

Q. And what became of that?

A. It was delivered to the Columbia River Salmon Company.

Q. At your instance? A. Yes, sir.

Q. And what price was realized for it?

A. 19½ cents a pound. In other words, I think it is three ninety a ton.

Q. Have you calculated out the arithmetic, and can you give [182] us that in dollars and cents?

A. Well, I have their statement for it.

Q. That is all I want to know. How much did the fish bring? A. It is $1368.51.

Q. There was some question made in the earlier part of the case about the amount of ice on board the Melody. Can you tell us anything about that?

A. At the time of the accident or previous?

Q. Well, when you left Astoria first?

A. We took six tons of ice.

Q. How much would you estimate you had then at the time of the accident?

A. Oh, in the neighborhood of five tons.

Q. You have heard the other testimony, have you, about how much the Melody was submerged?

A. Yes, sir.

Q. Have you anything to add to that?

A. Well, she wasn't—from my knowledge she wasn't submerged quite as badly as they said.

Q. What was your thought about it at the time

(Testimony of Thomas Rustad.)

as to whether she would remain afloat or whether she would sink?

A. After she had stayed up as long as she had there was no doubt in my own mind she would continue to float.

Q. You mean after she had stayed up from the time you left her until to two and a half to three hours before you got back? [183] A. Yes.

Q. Is that what you mean? A. Yes.

The Court: I don't believe he told how the crash boat happened to come for him.

Mr. Wood: Yes. I would like to know.

Q. How did the crash boat happen to come out there, if you know?

A. Well, the only thing I can tell is from what they told me.

Q. Who? The crash boat people?

Mr. Bowerman: Are they here?

Mr. Wood: It is probably hearsay. Does counsel or the Court want to hear it?

The Court: I would like to hear it.

Mr. Wood: The Court wants to hear it.

The Witness: We were at the time sighted. We were sighted by about four Navy planes coming in from Siskiyou, or some place, on their way to Astoria.

Q. Excuse me. When you say you were sighted, do you mean the life raft or do you mean the Melody? A. No, we were in the life raft.

Q. And the patrol planes sighted you?

A. Yes.

(Testimony of Thomas Rustad.)

Q. Now go ahead. A. And they—— [184]

Mr. Bowerman: Now, if your Honor please—just a minute—I submit this is not even hearsay. This is pure imagination.

Mr. Wood: This is what the crash boat people told him. The Court said he wanted to hear it.

The Court: Yes, I will hear it.

Mr. Bowerman: That is not what he was telling.

The Court: Well, he hasn't got squared off yet.

Mr. Wood: Go ahead.

The Court: You say four Navy planes?

A. Yes, sir. They sighted us.

The Court: Why don't you get right down to it? What did the crash skipper tell you as to how he happened to come to your rescue?

A. He said that these four Navy planes had spotted us and called in to the Coast Guard station, I guess it is the Coast Guard station, and reported a life raft with five men in it, and to——

The Court: That is all we need. Where is the crash boat skipper? Is he available?

Mr. Tatum: He is in Astoria, your Honor. These two men we have here we will call later this afternoon were skippers on the Triumph and the other surfboat, and the Melody.

Mr. Wood: That is all, your Honor.

The Court: You see, Mr. Tatum, you have a dispute here [185] between libelant and what has been disclosed here as to what the crash boat skipper advised was what he could do with his craft. This man says the crash boat could have taken hold

(Testimony of Thomas Rustad.)

of the boat, and was willing to do so. Libelant has testified the crash boat skipper said they were not equipped or powered, or whatever it was, to take hold of the boat; their job was just to rescue life.

Mr. Wood: I didn't look at that point, and, if necessary, I think we could get the crash boat skipper up here. It is possible—I haven't talked with them, that these other Coast Guard men may be sufficiently familiar with the crash boat to know whether it would tow or not.

The Court: I don't want to stick my nose into it now, but it makes a whole lot of difference as to the crash boat proprietor's conduct, as to whether he said they were not equipped or powered to take hold of the boat.

Mr. Wood: Yes, I think you are right. I think we should get the crash boat skipper up here, if we can.

The Court: Cross-examine. He is through.

Mr. Bowerman: May I have just a minute here, your Honor? I want to ask this witness a question and I want to be sure myself.

Cross Examination

By Mr. Bowerman:

Q. Mr. Rustad—is that your name? [186]

A. Yes, sir.

Q. What did you say the state of the tide was at the time of your accident?

A. At the time of the accident it would be approximately high tide.

(Testimony of Thomas Rustad.)

Q. Approximately high tide? A. Yes.

Q. What time was your accident?

A. Ten minutes to one.

Q. Ten minutes to one?

A. Yes. We have no way of telling, other than my watch had stopped at that time.

Q. You were down in the galley?

A. I was on deck, in the galley.

Q. The galley is on deck. What were you doing? A. I was talking to the cook.

Q. And what happened?

A. Well, the boat took a sudden ordinary roll, and on top of that we had another sudden lurch and the boat went over, and that is all.

The Court: How about that? Did it go over and then come back?

A. It started to recover itself, and before it could recover it took a second roll and went fully, that is——

The Court: It stabilized there—never came back? [187] A. No.

Mr. Bowerman: Q. Was it over on the side?

A. As far as the mast, yes.

Q. Was the mast in the water?

A. Parallel with the water.

Q. And did the hold fill up with water?

A. I wasn't there to see, sir.

Q. What was happening when you got off?

A. Well, I imagine it was.

Q. Was there anything to keep the water out of the hold? A. Pardon?

(Testimony of Thomas Rustad.)

Q. Was there anything to prevent the water going in the hold? A. Hatch pole, tarpaulin.

Q. Did that come off or stay on?

A. It stayed on while I saw it.

Q. Huh? A. It stayed on while I saw it.

Q. While you saw it. Was it on when you came back there with this crash boat?

A. I could not tell, sir.

Q. Huh?

A. I could not tell. I didn't notice.

Q. Now did it dump you into the water or did you get off in the water?

A. I had to jump through the door to get out. When I went [188] through the door I was in the water.

Q. As you went out of the door you were in the water? A. Yes.

Q. And the boat was thirty-five or more degrees, so that the mast was in the water?

A. Yes, sir.

Q. And it stayed that way?

A. It stayed at about forty-five degrees, yes.

Q. Yes. Now when you got off the boat you thought it was going to sink, didn't you?

A. We didn't know.

Q. Well, that was your impression, wasn't it?

A. We had to be safe.

Q. Well, the boat wasn't all under water, was it? A. No, sir.

Q. What did you get off for?

(Testimony of Thomas Rustad.)

A. Well, I guess it is ordinary common sense. Anybody would play safe.

Q. Yes. Now you had a rubber lifeboat or raft, or something there? A. Yes.

Q. Was that fastened to the boat or was it loose?

A. It was fastened to the side of the boat.

Q. Fastened to the boat. Who took it loose so you could get out of there? [189]

A. The two men on watch.

Q. And was that before or after you left the boat? A. It was after.

Q. And they detached this raft so it would float in the ocean? A. Yes.

Q. Were you already in the ocean when they did this? A. Yes.

Q. And there would be two more men. What were they doing? A. Two more?

Q. You had five altogether, didn't you?

A. Yes, sir. The cook was on the mast; that is, in the wreck he was on the side up out of the water, and the other fellow was in the forecastle sleeping.

Q. How did he get out?

A. Through the escape hatch.

Q. Did that leave an opening so the water would get in there?

A. In order to get out it would have to open out, yes.

Q. Yes. So that the water came into the galley, and then when this water came out of there as far as you know it went into the hold; is that right?

(Testimony of Thomas Rustad.)

A. I would think so.

Q. Yes. So it filled pretty well up with water, didn't it, too? A. Yes.

Q. Now, when you got off on this life raft where were you [190] bound for?

A. We were not bound for any place, to begin with.

Q. Well, you could have tied up to the boat and stayed there if you had wanted to, couldn't you? A. Not necessarily.

Q. I say, you could have done it if you had wished to? A. Yes.

Q. There was nothing to prevent your staying right there with the boat, was there?

A. No, sir.

Q. You had no oars and gears aboard, had you?

A. Yes, sir.

Q. What did you have? A. We had oars.

Q. You could see the shore from where you started? A. Yes, sir.

Q. Did you start for shore?

A. Not right away.

Q. What did you do?

A. We hung on for a while. We tried to stay by the Melody?

Q. What?

A. We tried to keep as close to the Melody as we could with the oars.

Q. Why didn't you stay there?

A. On account of the breeze, the tides. [191]

(Testimony of Thomas Rustad.)

Q. The breeze affected you more than the Melody? A. Yes.

Q. You drifted apart? A. Yes.

Q. Couldn't you stay there?

A. We had none of the life raft, or——

Q. You had oars; you had fishing gear around there, didn't you?

A. They were on board the Melody.

Q. If this other man could get on the Melody you could get on, couldn't you?

A. Oh, yes.

Q. You could have tied this on there, if you wanted to? A. If we had done it right away.

Q. Well, at any time, couldn't you? With the oars you could combat this little wind, couldn't you?

A. Did you ever try to operate a life raft against the wind?

Q. No. I am entirely dependent on you.

The Court: He is an uplander.

Mr. Bowerman: My seagoing has mostly been in the prairies.

A. Well, sir, it is indeed quite a job.

Q. But you did have fishing gear; you had the lines; you had other things there you could have made fast with, if you wanted to, didn't you?

A. At first, yes.

Q. But your boat was fully insured, wasn't it?

A. Yes.

Q. You were not particularly interested in the

(Testimony of Thomas Rustad.)

boat right then. You were thinking more with respect to the men, weren't you?

A. I wouldn't say I was thinking about the result. I was thinking about the men.

Q. What time in the afternoon do you think it was by this time?

A. Approximately going on two o'clock.

Q. And you think you were six miles out in the ocean? A. Approximately so.

Q. You saw that long beach up there north from the head, didn't you? A. Pacific Beach?

Q. Yes; that long beach?

A. Yes. You could see it very plainly.

Q. Did you think maybe you could float in there?

A. I didn't understand you.

Q. Did it occur to you maybe you would land in there on that long beach?

A. Yes, very easy.

Q. Was that where you were heading for?

A. That is where we were headed for. So the Coast Guard——

Q. Yes, but you had gotten away how far do you estimate?

A. We were a mile and a half from the Melody.

Q. That is your estimate? [193]

A. Yes, sir.

Q. Were you using the oars and trying to go in the direction the wind was driving you, or what were you doing?

A. When they finally sighted us we were, yes.

Q. Huh?

(Testimony of Thomas Rustad.)

A. When they finally sighted us we were; yes, sir.

Q. You were heading away from the boat at that time? A. Yes, sir.

Q. How much of the boat was out of the water when you left it?

A. We could see the boat at all times.

Q. You could see it at all times?

A. Yes, sir.

Q. And you got off the boat because you thought it was going to sink, didn't you?

A. Yes, sir. We didn't know. I didn't think so, but——

Q. I asked you what you thought when you got off. A. Well——

Q. That was your notion, the boat was going to sink, and you left the boat with that in your mind?

A. Not in our mind, sir.

Q. Huh? A. Not in our mind.

Q. Yet you had it insured for all it cost you, you say? A. Yes, sir. [194]

Q. And this event occurred and you pulled out and left it? That is the fact, isn't it?

A. We just——

Q. Just answer that question.

Mr. Wood: He is trying to. Give him a chance.

Mr. Bowerman: Just a minute. Now I am cross-examining this witness, unless the Court has a different view. I would like to have the witness answer the question; then if he has something else to say that is his privilege.

(Testimony of Thomas Rustad.)

The Witness: The question again.

Q. Why, you can say whether you did pull out and leave the boat and you were running away from it; is that right? A. I object to that, sir.

The Court: Well, that is not your job. That is Mr. Wood's job.

Mr. Wood: I will object for him.

The Court: You just turn around the other way now.

The Witness: I didn't leave the boat right at first, sir.

Mr. Bowerman: I will go over that again, if you like.

Q. How long did you stay there by the boat?

A. Approximately an hour.

Q. How close did you get to the boat?

A. We kept drifting further and further away from her.

Q. Didn't you use the oars at all?

A. Yes, sir. We tried to stand by her but it was impossible. [195]

Q. You could not go back to her?

A. No, sir.

Q. When you say you were drifting away from her, did you make any immediate effort to stay by it?

A. We tried all that time during that hour, sir, but we saw it was impossible.

Q. What were you going to do if you stayed right there with the Melody, after you got off her?

(Testimony of Thomas Rustad.)

A. Well, I don't know. We just would have to stay there, I guess.

Q. This crash boat, that is a very speedy boat, I understand? A. Yes, sir.

Q. And where did it come from—that station up there on the beach?

A. I think it is stationed at Point Adams.

Q. And that would be on the Columbia River?

A. Yes, sir.

Q. Do you have one of these tide tables so you have any knowledge of what the state of the tide was at that time? A. Yes, sir.

Q. Isn't it a fact that the tide was high on the 24th of July last at 1:42?

Mr. Wood: At what point, please, counsel; Astoria or where?

Mr. Bowerman: Well, there is a rule here; that is what I was looking up when the Court asked me to go ahead with my [196] cross examination, and the nearest point I can find here is the mouth of the river there, and this seems to be what it is at 1:42 p.m. Do you know that?

A. I can't doubt the book, sir. That is what they are for.

(The Bailiff here passed the book to the witness.)

The Witness: This is Astoria and vicinity.

Q. How is that?

A. This says Astoria and vicinity.

Q. Well, you will find a list of towns in there, how much to subtract and add to all of them.

(Testimony of Thomas Rustad.)

A. It still says "Tide Tables for Astoria and District."

Q. Yes, I understand.

A. That is in the city itself. That is at the waterfront of Astoria.

Q. What is the nearest point to where you were that is in that book? A. That is the nearest.

Q. What?

A. That is the nearest, and then there is an hour's difference, you will notice.

Q. There is a list of towns given there, isn't there, with a calculation as to what you are to subtract or add? A. Yes.

Q. All right. What is the nearest place given there to where [197] you were?

A. You look it up.

Q. Well, can't you find it? A. Yes.

Q. Well, what is it?

A. Do I have to do that?

Mr. Wood: Tell him if you can.

Mr. Bowerman: Q. You have had experience before in court, have you?

A. Pardon.

Q. Have you had experience in court before?

A. No, sir.

Q. Have you been a witness before?

A. No, sir. (Pause). Are you waiting for me to answer, or what?

Q. Yes.

A. You are supposed to subtract an hour and ten minutes, entrance north jetty.

(Testimony of Thomas Rustad.)

Q. Were you at the north jetty?

A. Approximately. Six miles out, sir, general location.

Mr. Bowerman: May we introduce that book, with the consent of counsel? It is put out by the Public Council.

Mr. Wood: Yes.

The Court: Admitted.

(The book, entitled "Official Tide Table, Astoria and Vicinity," etc., so offered and received, was marked Libelants' Exhibit No. 4.)

LIBELANTS' EXHIBIT No. 4

All Tide Standard Time—For War Time Add One Hour

OFFICIAL TIDE TABLE

Astoria and Vicinity

The Beebe Company—Established 1884

Astoria - Portland

THE BEEBE COMPANY

Tide Tables for Astoria District
JULY

HIGH—		A. M.		P. M.	
Date		h. m.	ft.	h. m.	ft.
1	Sun.	5:05	7.6	6:25	7.7
2	Mon. ☾	6:15	7.1	7:14	7.9
3	Tue.	7:29	6.7	8:07	8.3
4	Wed.	8:44	6.4	9:01	8.6
5	Thu.	9:57	6.3	9:53	8.8
6	Fri.	11:03	6.5	10:44	9.0
7	Sat.	12:08	6.7	11:37	9.1
8	Sun.	.....	.....	1:01	6.9
9	Mon. ●	0:25	9.1	1:50	7.1
10	Tue.	1:14	8.9	2:36	7.3
11	Wed.	1:59	8.6	3:19	7.4
12	Thu.	2:44	8.2	3:58	7.4
13	Fri.	3:30	7.7	4:41	7.4
14	Sat.	4:17	7.2	5:23	7.4
15	Sun.	5:06	6.6	6:05	7.4
16	Mon.	5:59	6.1	6:46	7.4
17	Tue. ☽	7:00	5.7	7:32	7.4
18	Wed.	8:06	5.4	8:20	7.5
19	Thu.	9:17	5.3	9:06	7.6
20	Fri.	10:22	5.4	9:53	7.7
21	Sat.	11:19	5.7	10:39	8.0
22	Sun.	.....	.....	12:15	5.9
22	"	.....	.....	11:24	8.2
23	Mon.	.....	.....	12:58	6.2
24	Tue.	0:10	8.4	1:42	6.5
25	Wed. ○	0:55	8.6	2:23	6.8
26	Thu.	1:40	8.7	3:03	7.1
27	Fri.	2:25	8.6	3:40	7.3
28	Sat.	3:15	8.3	4:21	7.6
29	Sun.	4:07	7.9	5:03	7.8
30	Mon.	5:04	7.3	5:49	8.0
31	Tue. ☾	6:00	6.7	6:38	8.0

JOHNSON
Sea-horse OUTBOARD MOTORS

THE BEEBE COMPANY

Tide Tables for Astoria District
JULY

LOW—		A. M.		P. M.	
Date		h. m.	ft.	h. m.	ft.
1	Sun.	11:53	0.0	.....	.....
2	Mon. ☾	0:35	2.1	12:45	0.6
3	Tue.	1:45	1.6	1:42	1.1
4	Wed.	2:51	1.0	2:41	1.6
5	Thu.	3:55	0.3	3:41	2.0
6	Fri.	4:53	–0.4	4:40	2.3
7	Sat.	5:48	–1.0	5:35	2.5
8	Sun.	6:38	–1.3	6:30	2.5
9	Mon. ●	7:26	–1.5	7:23	2.6
10	Tue.	8:11	–1.4	8:13	2.5
11	Wed.	8:55	–1.3	9:04	2.5
12	Thu.	9:35	–0.9	9:52	2.4
13	Fri.	10:15	–0.5	10:43	2.4
14	Sat.	10:56	0.1	11:36	2.3
15	Sun.	11:36	0.7	.....	.....
16	Mon.	0:28	2.2	12:20	1.3
17	Tue. ☽	1:26	2.0	1:07	1.8
18	Wed.	2:23	1.7	1:58	2.3
19	Thu.	3:21	1.2	2:53	2.7
20	Fri.	4:15	0.7	3:47	3.0
21	Sat.	5:05	0.2	4:39	3.1
22	Sun.	5:51	–0.3	5:30	3.1
23	Mon.	6:35	–0.8	6:20	3.0
24	Tue.	7:16	–1.1	7:04	2.8
25	Wed. ○	7:56	–1.3	7:50	2.5
26	Thu.	8:37	–1.3	8:40	2.2
27	Fri.	9:16	–1.2	9:27	1.8
28	Sat.	9:58	–0.9	10:17	1.5
29	Sun.	10:40	–0.4	11:12	1.2
30	Mon.	11:26	0.2	.....	.....
31	Tue. ☾	0:16	0.9	12:17	0.9

COMPLETE STOCK
of PIPE FITTINGS

(Testimony of Thomas Rustad.)

Mr. Bowerman: Q. How long were you at the Melody before you drifted away?

A. Approximately an hour, sir. That is——

Q. Didn't you testify——

Mr. Wood: Wait. He hadn't finished his answer.

Mr. Bowerman: Q. (Continuing) ——on direct examination it was 30 to 45 minutes? Didn't you? Finish your answer.

A. That is the time we tried to stay by her, sir.

Mr. Bowerman: Answer my other question. Didn't you testify on direct examination you were at the Melody 30 to 45 minutes before you drifted away?

A. 30 to 45 minutes, did you say?

Q. Yes, sir.

A. I would say from forty-five to an hour.

Q. You haven't answered my question. I asked you, did you testify on your direct examination that you were at the Melody from 30 to 45 minutes before you drifted away? A. Yes.

Q. Now you change your mind and say you were 45 minutes to an hour? Is that your recollection?

A. I just got through stating it was forty-five to an hour. I didn't say——

Q. Oh. You didn't say thirty to forty-five? How is that? [199]

Mr. Wood: I submit to the Court the record will show that.

Mr. Bowerman: Q. Did you have any line on this raft? Did you have any line of any kind on your rubber raft?

(Testimony of Thomas Rustad.)

A. There is only a small line that circles a raft for holding onto it.

Q. That was all? A. Yes, sir.

The Court: How many oars? One pair?

A. Yes, sir.

The Court: How big a raft?

A. It is a 5-person raft, sir.

The Court: The same as used by the Navy?

A. Yes, sir. I think it is an airplane raft.

The Court: Airplane.

Mr. Bowerman: Q. Now you were there when Mister—when the man who made—the man from Mr. Wuori's crew was taken off the Melody? You were there, weren't you? A. Yes, sir.

Q. And did you ask the Coast Guard man to put a line on that boat? A. Yes, sir.

Q. Did he do it? A. No, sir.

Q. Did he give any reason why he would not do it?

A. He said as long as the Stampede had a line on there he [200] was unable to do anything.

Q. Could not do anything. What sort of a boat was that?

A. Oh, I would say it was in the neighborhood of 55 feet long, sir.

Q. A powerboat? A. Yes, sir.

Q. Built for towing?

A. Not especially, sir, but——

Q. Was it one of these self-propelling lifeboats or what was it?

(Testimony of Thomas Rustad.)

A. No, sir. It was—well, it was built for speed, more or less.

Q. Now when you left there where did you go to?

A. Point Adams.

Q. And were you there when the Melody came in at night? A. No, sir.

Q. Where did you stay that night?

A. At the hotel.

Q. You were not—did you go back and try to get on your boat when it had been towed in?

A. No, sir.

Q. Did you make any effort to be of any assistance in saving your boat?

A. We were in contact with the Coast Guard at all times.

Q. You haven't answered my question. I asked you whether you made any effort in saving the boat, physical effort. [201]

Mr. Wood: At what time?

Mr. Bowerman: Any time.

A. There was nothing that I could——

Q. I asked you if you made any effort. If you have anything further to say I presume the Court will permit. I would like to have you answer my question first. Tell us whether you made any effort to save that boat at any time.

A. I made an—that is, asked the crash boat to put a line aboard, which I have explained.

Q. And you gave the answer you have told about. Now did you do anything else?

A. I made arrangements for them, that is, I

(Testimony of Thomas Rustad.)

asked them if they would stand by as much as possible, which they said they would.

Q. And how long did they stay there?

A. The crash boat was on the scene about 45 minutes approximately.

Q. Then where did you go?

A. Point Adams.

Q. All of you, you and the crash boat crew. How many were in the crash boat crew?

A. I don't know, sir.

Q. Well, was it a large number of men or just a few?

A. I would say there was probably eight or ten.

Q. Probably eight or ten, and five of you?

A. Yes, sir. [202]

Q. And you went to Point Adams, and you put up in the hotel? A. At Astoria, yes.

Q. Oh, you went on to Astoria? A. Yes.

Q. You didn't stay at Point Adams?

A. No.

Q. How long were you at Point Adams when you came in there?

A. About an hour and a half, sir.

Q. Then you went to Astoria? A. Yes, sir.

Q. And put up at the hotel. What time did you get to Astoria?

A. In the neighborhood of between seven and eight o'clock.

Q. Now when did you next see the Melody?

A. The next morning.

Q. What time?

(Testimony of Thomas Rustad.)

A. It was about eight o'clock.

Q. Were you there when Mr. Wuori and his crew assisted the Coast Guard people in pumping it out?

A. I don't know whether they did or not.

Q. Well, were you there?

A. We came there at eight o'clock, sir.

Q. Well, was it pumped out when you got there?

A. Yes, sir. They had just finished.

Q. You had no part in pumping it out?

A. Not physically, sir. [203]

Q. Well, did you spiritually or mentally have some part in it?

A. I requested the Coast Guard and they said they would.

Q. Oh, you requested it and they said they would? A. Yes, sir.

Q. And Captain Wuori came down and did it? That is the way it was?

A. I don't know that he did.

Q. Who did you make the request of?

A. The man in charge, sir.

Q. Who was that?

A. I don't recall his name right now, sir.

Q. You have given us a bill here, or a contract for the construction of this boat that calls for $10,700.00, a 46-foot trolling boat. Was that a complete boat? A. A complete hull, yes.

A. A complete hull. Does that include the upper works?

A. Everything, sir, in the line of woodwork.

(Testimony of Thomas Rustad.)

Q. Huh?

A. Everything in the line of woodwork, rudder, everything except the engine.

Q. What about the steering works outside the rudder? A. That is installed by them.

Q. Huh? A. That is included. [204]

Q. That is included in this price. That is part of the hull, is it? A. Yes, sir.

Q. Where is the rest of this contract, the specifications? A. I don't understand you, sir.

Q. Well, this document says, "This to constitute an agreement between the Chambers Boat Company, Contractor, and Thomas B. Rustad, Purchaser, for the construction of a forty-six foot trolling boat according to the specifications as drawn up by Edwin Monk, Architect." Now that would tell what they were to do, wouldn't it? Where are those specifications?

A. I think Chambers Boat Company would have them.

Q. Well, wouldn't you have a set of them?

A. Not with me, no, sir.

Q. Well, you did have a set? A. Yes, sir.

Q. You do have the set somewhere, don't you?

A. I believe so. I don't know whether they are complete.

Q. Why didn't you have them with you here today? A. I saw no reason to.

Q. But you did think it a good idea to bring this Exhibit 3? A. And why not?

(Testimony of Thomas Rustad.)

Q. Well, why didn't you bring the rest of the deal?

A. That is all of it. That is the contract.

A. That is the contract. Well, this says it is to be done [205] according to the specifications?

A. Yes, sir.

Q. Why didn't you bring that along? Now, Mr. Rustad, I notice this is dated January 1st, 1945?

A. Yes, sir.

Q. Those boats are contracted some little time before you want to use them, aren't they?

A. Usually.

Q. How long did it take them to build this boat?

A. Three months.

Q. Three months. Now if you had lost this boat on the 25th of July, that was right at the beginning of the season, wasn't it, the fishing season?

A. Beginning of the tuna fishing season, yes.

Q. Yes. And if you had had to build another one in three months the season would have been over before you got it built?

A. Yes. That is, usually.

Q. Did you have any insurance to protect you against loss of the use of the boat for the season or just for the value of the boat as you figured it?

A. The value of the boat.

Q. You didn't have anything that was like use and occupancy on a building, or anything of that kind, if you know what it is?

A. (No response.)

Mr. Bowerman: I think that is all. [206]

(Testimony of Thomas Rustad.)

Mr. Wood: We will have some further questions. Do you want to go ahead on it now?

The Court: I guess you had better do it this afternoon.

Mr. Wood: I think we had better.

The Court: All right. Two o'clock.

(Witness excused.)

(Thereupon, at 11:59 o'clock a.m., a recess was declared until 2:00 o'clock p.m.)

Tuesday, October 30, 1945, at 2:13 o'clock p.m., court resumed herein as follows:

Mr. Wood: Mr. Rustad was on the stand, your Honor.

The Court: I think somebody should be called a captain in this case before we close it.

Mr. Wood: I hope we can. I don't know. Mr. Bowerman, you had closed, hadn't you?

Mr. Bowerman: I believe so.

THOMAS RUSTAD,

one of the Respondents, thereupon resumed the stand as a witness in behalf of the Respondents and further testified as follows:

Redirect Examination

By Mr. Wood:

Q. Mr. Rustad, in Mr. Bowerman's cross examination of you I [207] thought he was seeking to

(Testimony of Thomas Rustad.)

give the impression that because you were insured that you didn't take any particular interest in her safety and would go away and leave it. Now what about that? What was your state of mind about that boat out there in the ocean?

A. Well, the fact that it was insured, that didn't make any difference to us. We were very keenly interested in it at that time and continued to be so.

Q. And you stood by her for about an hour before the current separated you? A. Yes, sir.

Q. There was another point that I thought he attempted to make, which was that you thought the boat was going to sink. I don't know just what particular time he was referring to, but I think at one stage of his examination he said, "Didn't you think the boat was going to sink?" And you said "Yes." Now I want you to tell exactly about that. When you left the boat what opinion did you have about her? When I say left, I mean when you first jumped overboard and got into your life raft, what was your opinion about it?

A. Well, it happened so sudden that the only one thought in my mind was to get clear and get safe, and the two boys that were able to secure the life raft from the boat and come and pick me up——

The Court: You were lucky to get that far, weren't you? [208]

A. Yes. It so happened it was on the portside.

Mr. Wood: Q. I will put it this way: After you got into the life raft—that was a few minutes afterward, I suppose—and you had a chance to get

(Testimony of Thomas Rustad.)

around there and size things up, what was your opinion about the Melody's floatability?

A. At the time it happened we had no idea what would happen to it. It was an unknown quantity, but in order to be on the safe side, and for the crew's safety we had to take a life raft and see whether it would float or whether it would not, and if it floated—well, since it had we had no doubt in our mind but what it would float; that is, would continue to float.

The Court: Mr. Wood, don't they fish out further than six miles?

Mr. Wood: Ask him. I don't think he had reached the fishing grounds yet.

The Court: He had fish aboard.

Mr. Wood: The previous day.

The Court: How did he happen to be inshore?

Mr. Wood: I don't know. How about that, Tom?

A. We had left Astoria on the 22nd of July, and in common tuna fishing we take bait, which is around the North Head or the jetty of the Columbia.

Q. That is, you capture bait in the whole center in the ocean? A. Yes. [209]

Q. That is what you call taking bait?

A. Yes, sir. And we carry it in what we call the live bait racks. And we fished all during the 22nd and also the 23rd, and in taking the bait we didn't know what poundage we had or anything. We estimated we had between four and five tons.

Q. No. The Court wants to know why, if you

(Testimony of Thomas Rustad.)

were fishing, you were only six miles from North Head. Is that common fishing ground?

A. No.

Q. Then why did you fish there? Go ahead.

A. That is what I am coming at.

The Court: You ran out of bait?

A. In catching this five or ten tons we ran out of bait.

The Court: My Clerk wants to know—during the noon hour he asked me to find out—how you are going to get two men on a pole or one. He said when you caught a hundred-pound fish it takes two and when you got a smaller one it takes one. How do you know when to put two men on a pole and when to put one?

A. In fishing for albacore you seldom get fish that weigh over thirty-five pounds, or less. The average I would say is eighteen pounds.

The Court: You were going back out to fish that afternoon?

A. Yes, sir.

The Court: When you turned over were you seining for bait [210] then?

A. No, sir. We had taken our bait and were rounding Peacock Spit and were going back out to fish.

Mr. Wood: I think it is an interesting point, if the Court is interested in it. I don't think it bears on the case.

Q. Tell the Court how you throw that live bait

(Testimony of Thomas Rustad.)

out overboard and tuna gather around. Explain that to the Judge.

A. Well, in crossing out in the tuna banks or in the general ocean where the tuna are, it is generally good policy to look out for the gulls, and being it is a fact tuna feed on small fish and feed on the gulls gathered around also, and when sighted you go up and slack and circle around, and when making the circle you throw out the live bait and it attracts the fish to the bait. Being the live bait is larger, they seem to think that is a choice article for them, so they naturally gather around the bait, and in doing so they become so excited they will grab anything that hits the water. That is how they do.

Q. And how far off of the boat do you hook them?

A. The fish—oh, I would say we use a nine or ten-foot pole. It depends on the man that is using it, and that is the distance from the boat that you usually catch them.

Q. You just throw them over your shoulder into the boat? A. Yes.

Q. Now we will come back to the case. When you landed in [211] Astoria by the crash boat, what instructions did you leave with the Coast Guard before you went to the hotel?

A. I talked with Mr. Grubb, I believe his name was——

Mr. Bowerman: What was the name?

A. ——and asked him to——

Mr. Bowerman: What was the man's name?

(Testimony of Thomas Rustad.)

A. Mr. Grubb is his name.

Mr. Bowerman: What is that?

The Court: Grout.

Mr. Wood: Mr. Grout — G-r-o-u-t — Assistant Commander.

The Witness: ——and asked him if he would keep in contact with me at all times, if there was anything we could do, or how the progress of the towing of the Melody was coming, and then it was brought in if he would help, that is, pump it out and see that it was taken care of, because at the time the crew and myself were pretty well played out and wanted to get up where we could take a bath and clean up and have a little rest, and he agreed to do so.

Q. Did you ask him to be notified when the boat came in to the beach? A. Yes.

Q. Were you notified? A. Yes.

Q. By the Coast Guard?

A. By Mr. Grubb personally. [212]

Q. About what time?

A. I would say it was one o'clock approximately. I am not certain.

Q. In the morning? A. Yes, sir.

Q. Then at eight o'clock—well, when you were notified at one o'clock, did you give him any message or instruction then?

A. Yes, sir. I asked him if he—he said the boat had been brought in safely and was beached and they were waiting for the tide to drop, at which

(Testimony of Thomas Rustad.)

time he said he would put the pumps aboard and pump her out and see that everything was O.K.

Q. And at eight o'clock in the morning you went to the scene? A. Yes, sir.

Q. And did you find that the pumping had been done?

A. They had just finished pumping the boat.

Q. When you say "They," who do you mean?

A. The Coast Guard. Saying that I mean that I had not made any arrangements with anybody else.

Q. At that time I suppose the boat was dry on account of low tide? A. Yes, sir.

Q. And she laid there until she floated off?

A. Yes, sir. There wasn't anything anybody could do until she floated.

Q. And when she floated what did you do toward taking charge [213] of her and sending her to where she was going?

A. At that time I made arrangements with Mr. Grubb to have the boat towed to the Columbia River Salmon Company. There was no way we could do it, as we had no facilities ourselves, and he said he was very glad to do it for us.

Q. What that done?

A. Yes, sir. Well, eventually.

Q. There was some interruption, was there?

A. Yes, sir. It was sidetracked at Columbia River Packers instead of Columbia River Salmon Company.

Q. By whom?

A. So far as I know it was Mr. Wuori.

(Testimony of Thomas Rustad.)

Q. But you interfered and corrected that and had it sent to the Columbia River Salmon Company, did you? A. Yes, sir.

Mr. Bowerman: That is objected to as very leading.

Mr. Wood: Yes, it was.

Q. When the Melody was lying there on the beach at Point Adams that next morning did Mr. Wuori say anything to you about insurance on her?

A. Yes, sir. We came down at eight o'clock and Mr. Wuori called me aside and said he wanted to talk to me, which I said all right, and we went back on the stern and he asked me how much insurance I had and whether it was full coverage, and that was all he asked. [214]

Q. Did you answer him?

A. I told him I had full coverage and he——

The Court: The Coast Guard didn't make any charge for anything they did, did they?

Mr. Wood: No; they never do. They are not allowed to. I think that is all.

The Court: You say they are allowed to?

Mr. Wood: I don't believe they are permitted to make a charge. Excuse me. Mr. Tatum wants me to develop one further point.

Q. At the time your boat turned over were there any lines out which would make an entangled hazard to anything approaching it? A. No, sir.

Mr. Wood: That is all.

(Testimony of Thomas Rustad.)

Recross Examination

By Mr. Bowerman:

Q. Where were your lines at that time?

A. Pardon?

Q. Where were your lines at the time your boat capsized?

A. Lines? I imagine you are referring to——

Q. Just the same kind that counsel talked about.

A. Well, that will cover all the lines, as a matter of fact. Our tie-up lines were secured, as they always are when we are going to sea, and trolling lines, as we had reached our fishing [215] ground, were secure in the stern.

Q. What do you mean by that?

A. Tied up.

Q. With what?

A. Well, it is kind of a hook that we fasten our lines on, tie them fast so that the waves or anything that comes over won't wash them.

Q. Did you lose your lines between the time your boat capsized and you got it back?

A. No, sir.

Q. They were all there? A. Yes.

Q. All tied to this hook?

A. Our trolling lines were tied to the hook, yes.

Q. You didn't lose any lines?

A. Not that I can recall.

Q. Huh? A. Not that I can recall, sir.

Q. Well, if you had lost some you would have remembered it? A. Yes, sir.

(Testimony of Thomas Rustad.)

Q. So you are prepared to say you didn't lose any lines on it? A. Yes.

Q. And you do say so? A. Yes, sir.

Q. All right. Now you say that Mr. Grubb told you that he [216] pumped your boat out for you?

A. I just took that for granted, sir. I asked him to do it and he said he would.

Q. Well, I see. He told you he would do it?

A. Yes, sir.

Q. Then he told you he would haul it over and deliver it to the Columbia River Salmon Company?

A. Yes, sir.

Q. And do they do that service regularly down there gratis for people that ask them to, that you know of?

A. I don't know whether they have charged anybody else before. He never charged me. He said he would be very glad to do it.

Q. When you got there the next morning the boat was pumped out? A. Yes.

Q. And these gentlemen that had saved the boat and brought it in were there, too, were they?

Mr. Wood: I object to the question. I object to the form of the question. The gentlemen didn't save the boat. The Coast Guard saved the boat.

The Court: You go further than that and say they are not gentlemen, don't you?

Mr. Wood: Yes, sir.

Mr. Bowerman: I didn't understand the Court's remark.

The Court: I didn't rule. [217]

(Testimony of Thomas Rustad.)

Mr. Bowerman: What?

The Court: I didn't rule. I am not going to.

Mr. Bowerman: Did he answer the question?

The Court: He asked you about Wuori and his crew, whether they were there, whether he knew what you had done. A. Yes, they were there.

Mr. Bowerman: Q. Where were they from your boat?

A. I believe they were there standing around it, or some were on it.

Q. How is that?

A. Some were there standing around it and some were on it. I don't know their exact positions. I wasn't up there to ascertain it.

Q. Was the clearing of the water out of the boat—had that been completed before you got there?

A. They had just finished.

Q. They had just finished it. When you say they had just finished it, who do you mean?

A. The Coast Guard.

Q. All right. Now just indicate who it was and what the various members of the Coast Guard were doing?

A. I don't know their names. All I can say is that the Coast Guard boys were standing by the pump and were rolling up the hose.

Q. And what was Captain Wuori doing? [218]

A. I don't know.

Mr. Wood: He was asking about insurance.

Mr. Bowerman: What?

Mr. Wood: He was asking about insurance.

(Testimony of Thomas Rustad.)

Mr. Bowerman: If you are going to testify, get on the stand. Otherwise I would like to ask this witness.

The Witness: I don't know what he was doing at the time I arrived.

Q. Where was he?

A. That I don't know. He was evidently there, because he asked to talk to me a few moments after I was aboard the boat.

Q. Were any of the members of his organization on the boat when you got there?

A. Yes, sir. There was one I remember specifically.

Q. Was he one of the gentlemen sitting in the back part of the room? A. Yes, sir.

Q. Will you point him out to me?

A. Mr. Syvanen I believe is his name.

Q. Syvanen. What was he doing?

A. Standing there.

Q. Was he on the deck? A. I believe so.

A. Well, was there anyone below deck?

A. Not that I know of. [219]

Q. You haven't any knowledge yourself as to who actually pumped the boat out, have you?

A. Not being there I can only go by what the Coast Guard told me.

Q. What?

A. Not being there I can only go by what the Coast Guard told me.

Q. Your statement, sir, that the Coast Guard pumped the boat out is pure assumption.

(Testimony of Thomas Rustad.)

A. Well, I don't think the Coast Guard would lie.

Q. Well, that is a matter of opinion. But you didn't see the Coast Guard do anything incidental to pumping the boat out, did you?

A. Other than handle a pump, that is, rolling up a hose and taking the pump away.

Q. That was their pump, wasn't it, a Government pump that appeared there? A. Yes, sir.

Q. It is quite natural they would take it back, isn't it?

A. Yes, sir, unless it was borrowed.

Q. Well, if it was borrowed they would still want it back, wouldn't they? I am trying to find out what you base your statement on, which you have repeated a number of times, that the Coast Guard pumped the boat out. It is a pure assumption of what someone else told you; is that right? [220]

Mr. Wood: No. I object to that.

Mr. Bowerman: Just a minute, your Honor.

Mr. Wood: I object to the statement—it is pure assumption—for this reason: The man has already testified he asked Grubb to have it pumped out and it is presumed Grubb would do it, but when he got there he found him standing by the pump and rolling up the hose, and it is not assumption.

The Court: He said more than that. He said a Coast Guard told him he pumped it.

Mr. Wood: Well, you can leave that out.

The Court: I am not going to leave it out because it is in the case.

(Testimony of Thomas Rustad.)

Mr. Wood: O. K.

Mr. Bowerman: Q. Who told you that the Coast Guard pumped it out? A. Mr. Grubb.

Q. Mr. Grubb. Is he here today?

A. No, sir.

Q. Huh?

A. No, sir. I will also add that Mr. Jensen also informed me.

Q. Who? A. Mr. Jensen.

Q. One of these gentlemen here in the courtroom? A. Yes, sir.

Q. And he told you what? [221]

A. He also said that they had——

Q. Who?

A. ——finished pumping the boat out.

Q. Mister—— A. Mr. Jensen.

Q. Jensen told you that the Coast Guard had pumped the boat out? A. Yes, sir.

Q. He told you that there, did he?

A. The next morning.

Q. That would be the 25th, wouldn't it?

A. Yes, sir.

Q. Who else could have heard that besides you and Jensen? A. I don't know, sir.

Q. Well, was anybody around? Was it a general conversation?

A. I didn't think it important at the time to notice.

Q. No. Now what did Mr. Jensen say to you? Did you ask him who pumped the boat out?

A. No, I didn't.

(Testimony of Thomas Rustad.)

Q. What did you say to him and what did he say to you?

A. I believe when I came out I naturally said, "Good morning," and asked how everything was going and he said they had just finished pumping the boat out—the Coast Guard.

Q. He said they had finished pumping the boat out? A. He said the Coast Guard had.

Q. He didn't say he had any part in it; he said the Coast [222] Guard. Is that what he said?

A. Well, he was part of the Coast Guard.

Q. Oh, Jensen was part of the Coast Guard. I thought you said somebody connected with Wuori said that.

A. You must be mistaken.

Q. I see. Just the Coast Guard?

A. Yes, sir.

Q. Grubb told you that and Wuori told you that? A. Yes, sir.

Q. Who else? A. Nobody I know of.

Q. Who have you seen there that has been a witness against you of the Wuori people? Any of them there?

A. I remember Mr. Syvanen for one; Mr. Wuori.

Q. What was Mr. Syvanen doing?

A. He was standing on deck.

Q. He was standing on the deck, doing nothing?

A. Well, as far as I could see, yes.

Q. Who else was there? A. Mr. Wuori.

Q. Mr. Wuori was there. Where was he?

(Testimony of Thomas Rustad.)

A. I don't know.

Q. You didn't see him?

A. I don't remember in what position he was. He might have been standing on the sand; he might have been on deck or anyplace. [223]

Q. All right. Who else was there?

A. I don't know. I had never seen the other fellows before and I could not tell.

Q. Are they here today? Have they been witnesses in the case?

A. They evidently were on the boat. They are here now.

Q. How many men were on the boat, according to your best recollection? A. I don't know.

Q. Well were there five or fifteen?

A. There were four, from all I could gather.

Q. There were four men on the deck?

A. On the Stampede at the time of the accident. I don't know how many were on the deck when we arrived.

Q. I am talking about down there when they said they pumped the boat out. You understand that, don't you?

A. I have no idea how many there were.

Q. Well, was it a large crowd or just a few?

A. A few.

Q. Were there four? Was Mr. Wuori's people there?

A. That I would not say. I didn't see them. I didn't see them together at one time and I don't know.

(Testimony of Thomas Rustad.)

Mr. Bowerman: That is all.

Mr. Wood: That is all.

(Witness excused). [224]

The Clerk: Will you state your name, please.

Mr. Jensen: Arloy F. Jensen.

ARLOY F. JENSEN

was thereupon produced as a witness in behalf of the Respondents and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Tatum:

Q. Your name is Arloy F. Jensen, is that correct? A. Yes, sir.

Q. You are chief boatswain's mate of the Coast Guard? A. Yes, sir.

Q. How long have you been with the Coast Guard? A. Since July 30, 1935.

Q. Since 1935. Are you now stationed at the Point Adams station, Hammond, Oregon?

A. Yes, sir.

Q. How long have you been stationed there?

A. I have been stationed there ten years and three months.

Q. Ever since you have been in the Coast Guard?

A. That is right.

Q. Were you on duty on July 24th, 1945, the day that the Melody overturned at sea?

(Testimony of Arloy F. Jensen.)

A. That is right, sir.

Q. Did you receive a call from anyone to come to the aid of the Melody, or did the Coast Guard receive a call? [225]

A. Yes, we received a call from KDZZ, from the fishboat Stampede.

Q. KDZZ. And what was the gist of that message, Mr. Jensen?

A. Well, we received the call and they stated that they were standing by the fishboat Melody and she was submerged and part of the pilothouse and the afterboat was showing. That was all.

Q. Did they ask you to come out and help them, or ask the Coast Guard to come out and help?

A. Well, I didn't receive the call myself, but naturally when we receive a call like that the first thing we do is to proceed immediately to assist in a case like that.

Q. Did you do that? A. Yes, sir.

Q. What kind of a boat did you go out in?

A. I went out in a 36-foot boat, lifeboat.

Q. Who was in command of that boat?

A. I was.

Q. What is the horsepower of that?

A. That is 75 horsepower gasoline.

Q. How long did it take you to get out to the scene where the Melody and the Stampede were?

A. Well, we left the station at about 3:20. I think that it was about five or ten minutes, or ten or fifteen minutes after five at the time that we arrived alongside of the fishboat Stampede. [226]

(Testimony of Arloy F. Jensen.)

Q. Mr. Jensen, I will ask you to step down for just a moment to this chart which has been marked Libelants' Exhibit 1, and ask you to indicate on that chart where the Melody and Stampede were approximately at the time you arrived at the scene?

A. Well, if you had a parallel rule here I might show you better. There is 279 degrees true from North Head, as I have it. That is as close as I could judge at the time.

Mr. Wood: He wants a parallel ruler.

The Witness: Well, this will do all right.

Mr. Fulton: I don't have any here.

The Witness: Well, it is 279 degrees from North Head, approximately seven miles off. If I had a parallel rule—this wouldn't do any good. This won't be accurate, inasmuch as you want to arrive at a parallel line.

Mr. Wood: If the witness wants to I can send and get a pair of rulers in about ten minutes. We can postpone this and do this later.

The Witness: You can if you want to, but I can show you an approximate area within a radius of one mile. The exact position, or dot, is something I could not tell from where I was at. You understand that.

Mr. Thomas Rustad: Do you want that? That is a straight edge.

The Witness: It is pretty hard to do it. (Witness measuring) It is a case you have to more or less guess at. When you haven't [227] got a parallel rule it is pretty hard to do. (Witness continues

(Testimony of Arloy F. Jensen.)

measuring) Seven miles would be—that is about as close as you can get it without a parallel ruler.

Mr. Tatum: Q. Will you make that a large No. 1 and circle it, Mr. Jensen, please. Just write over there. A. (Witness does as requested.)

Q. That point marked with a 1 and a circle around it is the point where you came upon the Stampede and the Melody as closely as you can tell. Let me check that distance again.

Mr. Wood: That is upon Libelants' Exhibit 2.

Mr. Tatum: Libelants' Exhibit 1.

Mr. Wood: 1? That is right, it is Exhibit 1. How much is a mile there?

A. How much is a mile? One of these distances right there is a mile.

Mr. Wood: Mark it there. I want to see how far you are off.

The Witness: One mile is here. It is equal to two here.

Mr. Wood: Is it about a quarter of an inch to a mile?

A. It is about three-eighths. No, no.

Mr. Wood: Well, that is close enough.

The Witness: Three-eighths is close enough.

(Witness returns to witness chair.)

Mr. Tatum: Q. Mr. Jensen, when you arrived at this point which you have just indicated what did you find? [228]

A. Oh, we found that the Stampede II had the derelict in tow.

(Testimony of Arloy F. Jensen.)

Q. What happened when you came up alongside?

A. Well, we saw that the Stampede had the Melody in tow.

Q. And did you have any conference or agreement—— A. Yes, we did.

Q. ——with members of the crew of the Stampede as to what you were going to do?

A. Yes. We talked to them.

Q. And what did you decide to do?

A. Well, we could see that he wasn't making very much progress, and on account of there was a northerly set, a set kind of offshore, and we asked if he wanted us to give him a hand. He said yes, he would like to have us tow very much.

Q. So what did you do?

A. So I went alongside of the—I went up to the Melody and put two men aboard.

Q. How did you put them aboard; by means of a raft, or did they just jump?

A. No. I put the base of the motor lifeboat close to the pilothouse. By grabbing the rigging and slipping on the top of the pilothouse they got aboard the fishboat Melody in that time.

Q. What did those men do?

A. Well, they were receiving instructions from me as to what to do. They climbed aft and they could not—I was going to [229] fasten the towing hawser from the motor lifeboat to the Melody. They were looking around back there. Of course, the boat being awash it was hard to walk around. They

(Testimony of Arloy F. Jensen.)

could not find any cleat back there they could make a towline fast to, so they asked me whether they could make a towline fast. I said, "How about getting underneath the fish hatch and getting hold of a rudder stock?" Well, it was pretty hard to do because the swell once in a while would come clear over the stern. So they finally chopped a hole through the top part of the deck in back of the fish hatch, so that a line could be passed through the hole and around the sternpost and up over the deck boom and made fast in that manner.

Mr. Wood: Did you say sternpost?

A. Rudder stock. That is what I meant to say.

Mr. Tatum: Q. Did your men do that?

A. Yes, sir, they did.

Q. With your towing hawser?

A. That is right.

Q. At that time did the Stampede have a line aboard the Melody?

A. Yes, they had—oh, while they were doing that, the Stampede's line that they had aboard broke; the towline that they had aboard the Melody broke.

Q. That was while your men were aboard?

A. That was while our men were aboard, yes.

Q. What did you do with the Stampede's broken line?

A. Well, the Stampede's broken line, they didn't do anything with that. The Stampede came back and another line was passed aboard from the Stampede to the Melody, which our men made fast.

(Testimony of Arloy F. Jensen.)

Q. Your men made the new line fast to the Melody? A. That is right.

Q. Then how did you take your men off?

A. Our men were taken off by one of the 36-foot motor lifeboats from Cape Disappointment. They had arrived about fifteen to twenty minutes after we did. They took the men off and put them back aboard our boat.

Q. Did the lifeboat from Cape Disappointment put a line aboard? A. No, sir.

Q. Was that the boat that stood by all the way in? A. That is the boat that stood by.

Q. When did the Triumph arrive on the scene?

A. Well, the Triumph, they arrived about, oh, thirty to forty-five minutes after we did.

Q. Were your men still on board the Melody at that time?

A. Our men were still on board the Melody at that time, yes.

Q. Did they make a line from the Triumph to the Melody?

A. Yes. They took a towline from the Triumph and that was also secured to the Melody.

Q. During all of this time you were up there close to the [231] Melody, did you see any fish-lines or nets, or anything floating around that were a hazard?

A. No, sir. I don't recall that there was. Otherwise we probably would not have went alongside.

Q. How was the sea at that time?

A. I would say it was light to moderate sea.

(Testimony of Arloy F. Jensen.)

Q. What about the wind?

A. The wind was,—oh, six to eight miles from the southwest, light.

Q. In performing this operation, or getting your line aboard, what, if anything, was dangerous about doing that?

A. Well, there was some danger to the two men that I had aboard. Even though they had life jackets on them there was a certain amount of oil, you know, fuel oil or lubricating oil, that naturally would float around, probably the decks and all being under water, would be slippery, see; and there was danger, too, in having to chop a hole through the deck under the water and at times they had to stick their heads under water to see whether they could make the towing faster in order to get it fastened under the rudder stock.

Q. Was there any danger to the lifeboat?

A. No, there was no danger to the lifeboat.

Q. Now that you had three lines on the Melody, one from your boat, one from the Stampede, one from the Triumph, did you then start out for the Columbia River? [232]

A. Yes, we then started out.

Q. Was the Stampede in the middle of this towing flotilla? A. Yes, that is right.

Q. Was your boat on the portside of the Stampede? A. That is right.

Q. And the Triumph was on the starboard side of the Stampede? A. On the starboard side.

Q. Then did anything happen from that time

(Testimony of Arloy F. Jensen.)

until you started to enter the channel of the Columbia River?

A. No, nothing happened, except that we didn't make very much time with it.

Q. It was too slow a job?

A. Yes, it naturally would be.

Q. At what time did you start coming into the mouth of the Columbia River?

A. Oh, I would say about—oh, probably about 9:45, 9:30 to—somewhere between 9:30 and 10:00 o'clock.

Q. About what time was it that the Stampede got into trouble with its wheel?

A. Oh, it was about 10:30 or 10:45.

Q. Where were you then?

A. Oh, we were—as near as I could tell we were approximately seven to eight hundred yards, one hundred twenty degrees true from No. 5 channel buoy.

Q. Will you step down and indicate on Libelants' Exhibit 2, the [233] chart of the entrance of the Columbia River, approximately where that was?

Mr. Fulton: What was that last, Mr. Reporter?

(Last question read.)

Mr Bowerman: What was the answer?

(The last answer was thereupon read.)

The Witness: That is No. 5-A. Again we should have parallel rules to do more exact work. I wish I had known and brought them along, and dividers, too, to get the distance.

(Testimony of Arloy F. Jensen.)

Mr. Fulton: You take this, too.

The Witness: I never navigated like this before in my life.

Mr. Tatum: Q. I only want an approximation, Mr. Jensen

The Witness: Will you hold this? That is it. Just let go of it now. Now seven or eight hundred yards. Eight hundred yards would be about three-quarters of an inch. Now what do you want?

Q. Make a circle there and put a 2 in the center of that circle.

A. (Witness does as requested.) That is approximately it.

Q. That point you have just indicated is the point where the Stampede fouled its line; is that correct? A. Yes, sir.

Q. Mr. Jensen, you were on the portside of the Stampede. Could you tell what happened at that time, or what happened to the [234] best of your knowledge?

A. Well, we were going along pretty good after we got in the river, bein gas it was flood tide, and all of a sudden I could see the Stampede start slowing down. Naturally we were moving ahead. I could see something was wrong and we shut it down and threw it out of gear and stopped the boat and I topped over to port so I would not foul with the Stampede and the Triumph and looked over to the Stampede. I thought maybe she was broken down or disabled, and I saw him taking in on the cable

(Testimony of Arloy F. Jensen.)

and I heard him hollering the cable was fouled on the bottom.

Q. You heard someone from the Stampede say that?

A. Yes. There was a little bit of excitement there, you know. And then the—I heard Shaw holler from the Triumph.

Q. Who was Mr. Shaw?

A. That is the——

Q. He was the Coast Guardsman in charge of the Triumph?

A. That is right. He was in charge of the Triumph.

Q. All right. Go on.

A. He said, "You are going to foul my towline." He hollered to the Stampede. I don't know whether the Stampede heard him or not.

Q. Did the Stampede change its course in any way that you could tell?

A. No, they didn't change their course, with the exception that [235] they were taking in the towing cable, trying to clear themselves.

Q. To clear themselves from what?

A. From the bottom. That is all I know.

Q. Did that cause them to move back and forth from their position in the middle of the flotilla?

A. Well, naturally if we were taking in on the cable the boat would naturally go backward.

Q. But would it move from side to side?

A. No, it would not move from side to side. No.

(Testimony of Arloy F. Jensen.)

Q. What happened after you heard Mr. Shaw call?

A. Well, then it was only a matter of maybe seconds, or minutes, and then Shaw says, "You have got my towing hawsers fouled up in your wheel."

Q. Then go ahead. What happened from then on?

A. And from then on the Stampede became disabled and the Stampede had to let go of the towing cable, and the hawser, I believe. I could not see, being it was dark. We picked up the hawser from the Triumph and it was cut, and the end of it passed back, the end still fastened to the Melody was passed back aboard the Triumph.

Q. How did the Melody let go of its line? Did they take it off out there?

A. I didn't see how they let go of the cable. All I know is that they dropped the cable, and from what I seen after the [236] boat got in the following day that they didn't have the cable on the drum, I just assumed that they let the whole cable go. And I think Mr. Wuori's thought in doing that, the cable being made fast to the Melody and we would tow the Melody in, that the cable would still be on the Melody by the time we beached the Melody, so he could pick it up the following day or the next morning.

Q. Was the cable on the Melody when it got in?

A. No, sir.

Q. You don't know what happened to the cable?

A. Yes, I know what happened to the cable. The

(Testimony of Arloy F. Jensen.)

line that they used from the cable that was made fast to the boat broke.

Q. Where did it break? Right next to the Melody?

A. Well, I should say there was a piece probably about fifteen or twenty feet of line left from the Melody.

Q. The remaining part of the towline, you don't know what happened to that? A. No, sir.

Q. It wasn't there when you came in?

A. No, sir.

Q. At the time all of this happened, Mr. Jensen, where were you in relation to the Peacock Spit? Were you just inside?

A. Well, in relation to Peacock Spit at the time, you mean?

Q. At the time of this fouling.

A. Well, we were just a little ways south of it, or southeast [237] of it there.

Q. At the time were you in more dangerous waters than you were when you first saw the Melody seven miles to sea?

A. Well, are you asking for my own opinion in regards to that?

Q. Yes, your own opinion; your knowledge from being down there on the river.

A. Well, yes, I would say she was, being as she was inside the river and she was closer to the Spit and the jetties.

Q. And if you hadn't been there there might have been some danger to the Melody—if the Coast

(Testimony of Arloy F. Jensen.)

Guard boats hadn't been there? That would have been a more dangerous spot than it was out at sea?

A. Well, yes; it would be, naturally. Sure.

Q. Then after the Triumph resecured its line, then what did you do?

A. Then we continued on towing the Melody up above our station boathouse and put her on the beach.

Q. About what time was that?

A. Oh, that was about 12:30 to 12:45 by the time we got it on the beach.

Q. From the time you picked up the Melody until the time you beached it were you at any time afraid the Melody might sink?

A. No; no, we were not.

Q. Why weren't you?

A. Well, being that she stayed afloat we knew there was no [238] reason why she should sink, unless we busted her up or something like that.

Q. Then when you beached the Melody did you leave any orders as to what should be done for the care of her during the night, or did they call you the next morning, or what, if anything, was done?

A. Well, after we got her on the beach, why, there was nothing more that we could do about it until the tide went out low enough so that we could pump her out or give all the assistance possible in preparing it for floating her the next day.

Q. So what did you do then? Go to bed after that? A. Yes.

(Testimony of Arloy F. Jensen.)

Q. What time did you get up the next morning?

A. Oh, about six o'clock, I guess.

Q. Did you go to work on the Melody then?

A. Yes, I went to work on it.

Q. Tell the Court what you did?

A. We have a two and a half inch Gorman Rupp pump, the make of the pump we used to pump the Melody out. It was taken out to the beach and the Melody was pumped dry with that.

Q. Who pumped the Melody dry?

A. It was done by the Coast Guard.

Q. Were you in charge of that operation?

A. Well, I can't say I was in charge of it, being Mr. Grubb was there. [239]

Q. Was Mr. Grubb present at the time is was pumped out? A. Yes, he was.

Q. And were you present at the time it was pumped out? A. Yes.

Q. And you were supervising the work the men were doing; is that right?

A. Well, there wasn't much to supervise to it. All there was, we just hooked up the two and a half inch hose to the pump and dropped the other end of it into the hull of the Melody and started the pump up and pumped her out.

Q. And the Coast Guardmen did that?

A. Yes.

Q. Did you see any of the Stampede crew at that time? A. Yes, I seen them.

Q. What did they do?

A. Well, they were helping around the best they

(Testimony of Arloy F. Jensen.)

could. There wasn't much they could do. There wasn't much anybody could do. The pump was doing the work and taking the water out.

Q. Who was handling one end of the pump that was in the Melody? A. He was handling it.

Q. Does it have to be moved from place to place, or does it have to be put in one place?

A. Not necessarily after it was dry. The suction end of it is dropped into the hold. It stays right there.

Q. Until it is all dry, and then it is taken out?

A. Yes, unless we move it. We did move it. We did try to pump some water out of the engine room.

Q. Who did, the Coast Guard?

A. Yes, sir. But there wasn't enough water in the engine room to bother with and it was kind of hard to get out, and it didn't do much good.

Q. What time did you finish pumping it out?

A. Oh, I don't know. About 7:30 or 8:00 o'clock.

Q. About 7:30 or 8:00 o'clock?

A. About 7:00 o'clock, I guess.

Q. Then when were you able to refloat the Melody, or were you there at the time it was refloated?

A. Yes, I was there at the time she was refloated. I was aboard the boat. We towed her off the beach.

Q. About what time was it 12:00 to 1:00 o'clock, or 2:00 o'clock?

A. Oh, I would say it was around shortly after noon.

(Testimony of Arloy F. Jensen.)

Q. Shortly after noon? A. Yes.

Q. And you were on the lifeboat that towed the Melody away?

A. Towed her, took her off the beach, yes.

Q. Were you on the boat that took her up to Astoria?

A. No, I wasn't on the boat that took it up to Astoria.

Q. Some other Coast Guard boat took her up to Astoria?

A. No. The same boat I was on took her up to Astoria, or [241] the same fellow on the boat took her up.

Mr. Tatum: I think that is all.

The Court: Why did it take you two hours to get there to the scene of the wreck?

A. Why did it take us two hour? Excuse me.

The Court: Yes.

A. Well, our powerboat only makes about seven or eight knots an hour—that is, miles an hour.

The Court: And where did you come from?

A. Point Adams.

The Court: That is fourteen or fifteen miles. Is that the point?

A. Yes; I think it was around fifteen.

The Court: Anyhow, you started out as soon as you got the call?

A. Yes, sir, that is right. Oh, possibly it may have been five or six or seven minutes from the time we got the call until we started out.

(Testimony of Arloy F. Jensen.)

Mr. Tatum: I have finished my direct examination.

Mr. Bowerman: O.K.

Cross Examination

By Mr. Bowerman:

Q. Mr. Jensen, I am not entirely clear about some of these distances. Will you give us your best judgment, with the distance from Point Adams Coast Guard station out to where [242] you found this boat when you out there, the Melody?

A. Well, I can lay it out on the chart for you, but I think it is around, oh, around fourteen or sixteen miles.

Q. Fourteen or sixteen miles. And your boat runs about—that would be about a 2-hour run for the vessel you had? A. Just about that.

Q. And this other Coast Guard vessel that was out there, what was the name of that, the Stampede?

Mr. Fulton: The Triumph.

Mr. Bowerman: The Triumph?

A. The Triumph.

Q. The Triumph, yes. A. Yes.

Q. What is its traveling capacity?

A. Oh, she will do about nine.

Q. Where did she come from?

A. She came up from Tillamook Rock. That is the Tillamook life station.

Q. That is down there on the coast?

A. That is eighteen miles south of the Columbia River.

(Testimony of Arloy F. Jensen.)

Q. How many miles? A. Eighteen.

Q. Eighteen miles. And you got notice of this accident out there to the Melody by some telephone, wireless telephone or something of that kind? [243]

A. Yes; radio telephone from the Stampede.

Q. That would be Mister——

A. Wuori's.

Q. Mr. Wuori's boat? A. Yes.

Q. And that is the way you got your information? A. Yes, sir.

Q. And do you know how the other Coast Guard got the word? A. The crash boat?

Q. No; the—— A. Triumph?

Q. The Triumph. How did they get the word, do you know?

A. They got the word from Point Adams station.

Q. You got the word first from Mr. Wuori; then you passed the word down to the Tillamook Station?

A. Yes. That was done by the men on watch at the station.

Q. Uh huh. Now there was another boat out there with your flotilla. What was that?

A. That was a 36-foot lifeboat from Cape Disappointment.

Q. Cape Disappointment. Where is that station? Is that inside the river or not?

A. Yes, it is inside the river. It is across on the Washington side.

Q. On that channel that goes into Ilwaco there?

A. That is right, sir. [244]

Q. Do you know how they got the word?

(Testimony of Arloy F. Jensen.)

A. Well, they have a radio telephone, also a receiver, and I imagine they got it by radio, and in addition it was probably phoned over from Point Adams.

Q. From your station? A. Yes.

Q. They had the same opportunity to get it by radio from Mr. Wuori that you had?

A. That is right.

Q. And I have forgotten just the sequence of your arrivals there. Were you the first one there?

A. Yes.

Q. Then the Triumph, then the one from Cape Disappointment?

A. No. It was first the lifeboat from Point Adams.

Q. That is your boat?

A. That is our boat.

Q. Yes.

A. Then there was the boat from Cape Disappointment.

Q. Yes. A. And then the Triumph.

Q. And you got out there—you left your station about 3:20 and arrived at 5:00; is that the way it was—5:10 or something like that?

A. 5:10 or 5:15, something like that.

Q. Now this Melody was being towed backwards, wasn't it? [245] A. Yes, sir.

Q. Your lines were all fastened to the back end of the boat? A. Yes, sir.

(Testimony of Arloy F. Jensen.)

Q. And when you got there the Stampede was hitched onto it and was towing as best it could?

A. That is right.

Q. And your line went down through some opening in the deck, I believe?

A. No, sir. I believe that line was fastened around the rudderstock.

Q. That is what I say; or was it underneath?

A. Yes. It went through the fish hatch. You see, there is the fish hatch in the back. We can get out. That is open back in there, and they can reach in and get hold of the rudderstock.

Q. Yes, that was fastened to the rudderstock. Then the other two lines were fastened—holes were made for them through the deck?

A. Yes. The hole was chopped through the top part of the deck.

Q. Was that fishing hatch, or whatever you call that place, was that pretty well filled with water when you got there?

A. Why, yes. It naturally would be. The stern was awash part of the time. Part of the time it was up out of the water, then a swell would come in and it would be under water. [246]

Q. To pass along there a person would be in considerable water in that hole, wouldn't they?

A. Yes, that is right.

Q. Your men—did they get down there to fasten the rudderstock?

A. Well, they were put on. I put them on it from the lifeboat aboard the Melody and they climbed

(Testimony of Arloy F. Jensen.)

that. I put them on the pilothouse and they climbed back aft and in the fish hatch.

Q. I though you said you cut a hole in the deck?

A. We cut a hole in the deck.

Q. Cut a hole in the deck?

A. Oh, yes. We cut a hole in the deck in order to pass a line through it to secure it. The line was passed through the hole around the rudderstock, and over the deck beam, because I didn't consider that the rudderstock was sufficient enough to hold her as she was being towed.

Q. And you wanted to make it more secure than just the rudderstock? A. That is right.

Q. So the other Coast Guard boat fastened on about the same way. There was a hole cut for their line, another hole, or how was it cut?

A. No. It was passed through the same hole.

Q. The same hole as yours? A. Yes. [247]

Q. Now there is some hazard in getting boats, even small vessels like this, in close proximity out in the ocean, isn't there?

A. Yes, there is considerable danger. You have to be careful of your own boat, that you don't damage it by hitting the other boat or submerged object, whatever you are approaching.

Q. While you were there and putting your lines on, the cable from the Stampede broke, as I understand?

A. The cables didn't break, no. The line they used in addition to their cable.

(Testimony of Arloy F. Jensen.)

Q. Oh, they had a line. What sort of a line was that? A. Oh, probably a Manila line.

Q. Whatever it was, it broke and had to be repaired and another one put on?

A. The line wasn't repaired, no. They just put another line on.

Q. They threw out the one they had and put another one on?

A. I don't know what they done with the line.

Q. No, but I say whatever happened, before you were there a long time their line had broken and they put another one in place of it so they could continue their part of the work?

A. Yes, sir, that is right.

Q. Yes. I wasn't trying to find out what became of the line. I just wanted to know they were in a position to go ahead with their towing. Do you recall, while your men were fastening [248] your line on the boat, that you asked Mr. Wuori to keep going full speed in order to keep the boat from sinking because of the assistance it would be to your men in getting their line on? In other words, as I understand Mr. Wuori, he slowed up while you were hooking on. The boat had a tendency to sink and you asked him to get up full speed so as to keep the boat dry in the protection of your men while hooking on, while they putting your line on the Melody?

A. Yes, we did. We done that only as an experiment, because I thought by doing that it would raise the stern up so that it would make it easier for our

(Testimony of Arloy F. Jensen.)

men to work so they could work in the dry, but I found that didn't prove very satisfactory because we asked them to slow down again, because instead of the Melody raising the seas were coming over in a greater force, consequently making it more hazardous for our men to work down there.

Q. They were down in the boat, in the water at that time? A. Yes.

Q. Trying to fasten your lines on; is that right?

A. They were in the back aft in the fish hatch, yes.

Q. Or underneath the deck, as I have understood these gentlemen?

A. It is not underneath the deck, no. It is in the deck.

Q. In the deck?

A. Yes. The fish hatch is cut in the deck. You see, there [249] is a hole in the deck. It is not underneath the deck.

Mr. Fulton It is a place where they stand, about like this table and the width of the table.

Mr. Bowerman: Q. Do you have the time of the day when the line became fouled in the propeller of the Stampede?

A. Yes. That was approximately around 10:45.

Q. About? A. About 10:45.

Q. 10:45? A. Uh huh; in the evening.

Q. Was Mr. Rustad, the gentleman sitting here, around during any of this work when you got there? Did you see him there during that day or that night?

A. Yes, I seen him. We met him. He was on

(Testimony of Arloy F. Jensen.)

the crash boat. While we were proceeding on out to the Stampede we met him. He was coming in on the crash boat.

Q. He had left or was coming into the river?

A. That is right.

Q. Do you recall about how far it was from this boat, and when it was you saw him?

A. From the boat?

Q. How far from the Melody?

A. Oh, I would say about two to three miles.

Q. Two or three miles? A. Yes. [250]

Q. And did you see any more of him that day or that night? A. No, sir, I didn't.

Q. But you found Mr. Wuori and his crew out there towing his boat in? A. That is right.

Q. When you arrived, and they were along there until they got in trouble? A. That is right.

Q. And after they got in trouble, that happened to be at night; is that the way it was?

A. Yes, sir.

Q. Now there was a propeller fouled out in that general area there somewhere at that time, wasn't there? A. Yes; quite a ways inside the river.

Q. What?

A. It was quite a ways inside the river, where Mr. Wuori got his propeller fouled.

Q. But it was there in the river at that time?

A. Yes, it was.

Q. How far was it up the river from where you got in trouble?

A. Oh, it was in about two and a half miles.

(Testimony of Arloy F. Jensen.)

Q. Two and a half miles?

A. Or two miles.

Q. It was on the way, however, to Point Adams?

A. Yes. We had to pass through the mine field to get up to [251] Point Adams.

Q. You had to pass through the mine field to get up to Point Adams? A. Yes, that is right.

Q. That was some harbor protection that the Government put in there during the war?

A. Yes, sir.

Q. Is it a fact that—which one of these fellows was it?

(Mr. Bowerman here conversed with Mr. Fulton in an undertone.)

Q. Do you know one of these men by the name of John Kurtti back here? Do you know him by name? A. No, sir.

Mr. Bowerman: Will you stand up, Mr. Kurtii?

Q. Did you see that gentleman there when they were pumping the boat out, pumping the Melody out? A. No, I can't recall seeing him there.

Q. You can't recall seeing him? A. No.

Q. I will ask you whether he wasn't down inside holding the hose to pump out some lower level water there it wasn't reaching?

A. Well, perhaps I can't recognize him because he is dressed up now, is probably the reason. A man looks quite different sometimes. [252]

Q. What was the condition of Mr. Wuori's men there that morning when this pumping job was going on? They were not dressed up then, were they?

(Testimony of Arloy F. Jensen.)

A. No, they were not. No.

Q. What was their condition? What was the condition of their clothes?

A. Well, they wore clothes like a fisherman would. He would not wear good clothes while he was fishing upon the boat.

Q. Did these men of Mr. Wuori take a part in that pumping operation, as well as your men?

A. Well, I can't just recall that they did, but naturally everybody there, everybody was helping. If anybody could possibly do something they would do it—those that were standing around there.

Q. Mr. Wuori was there in charge of the Melody when you got out there—had it in tow in the ocean?

A. Yes.

Q. With his boat?

A. He was in charge. He had the Melody in tow and he was the skipper of his own boat.

Q. Yes; and he had his own crew there?

A. That is right.

Q. And he asked you people to get out and help, and you did? I mean, he asked the Coast Guard for help and they did help?

A. He called me by radio and said that the Melody was submerged [253] and only part of the pilothouse and the stern showing, and I told him naturally in cases like that we would proceed to his assistance as fast as we possibly could.

Q. The purpose of his call was to get assistance from you folks?

A. That is understood, when they make the call.

(Testimony of Arloy F. Jensen.)

Mr. Bowerman: Yes. I think that is all.

Mr. Tatum: Just a bit more on this pumping out operation.

Redirect Examination

By Mr. Tatum:

Q. Mr. Jensen, as I recall, you testified on direct examination all that there was to do was to hook up the pump, put the hose there in the hull and start the pump going; is that right?

A. That is all that is necessary, as far as I know.

Q. Did your men take the pump out, install it and set it up? A. Yes, they sure did.

Q. And did your men put the hose into the hull?

A. Yes, I believe they did.

Q. Did your men operate the pump?

A. They sure did.

Q. Did your men take the pump out again and clean it up? A. They sure did.

Q. Was that all that was done in the cleaning out of the hull?

A. No, it wasn't. After the water was pumped out I believe they had some fish in her that was removed, taken out. [254]

Q. But you don't know for sure?

A. Now, let's see. Wait a minute. No. I am thinking about another boat now. Excuse me.

Mr. Tatum: That is all.

Recross Examination

By Mr. Bowerman:

Q. There was a lot of fish in this boat, wasn't there?

(Testimony of Arloy F. Jensen.)

A. Yes, there was. I wouldn't say lots of fish, but to me there was quite a few tuna fish.

Q. I think the record shows about three and a half or four ton.

A. Well, that is quite a few tons.

Mr. Bowerman: That is all.

Mr. Tatum: That is all.

(Witness excused.)

The Clerk: State your name, please.

Mr. Shaw: Donald William Shaw.

DONALD WILLIAM SHAW,

was thereupon produced as a witness in behalf of the Respondents and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Tatum:

Q. Your name is Donald Shaw?

A. That is right. [255]

Q. You are chief boatswain's mate of the United States Coast Guard, Mr. Shaw? A. Yes, sir.

Q. Your station is Point Adams Coast Guard station at Hammond, Oregon? A. Yes, sir.

Q. How long have you been in the Coast Guard?

A. Approximately seven years, sir.

Q. How long have you been stationed at Point Adams? A. Approximately seven years.

(Testimony of Donald William Shaw.)

Q. Since you have been in the Coast Guard?

A. Yes, sir.

Q. Were you stationed at that point on July 24th, when the Melody was capsized?

A. Sir, sir.

Q. Where were you at the time you first heard about the Melody being capsized?

A. We were on the way back from Tillamook Rock.

Q. Were you aboard the Triumph?

A. Yes, sir.

Q. Are you the officer who usually commands the Triumph? A. Yes, sir.

Q. On this particular day I believe you had a commissioned officer aboard; is that right?

A. Yes, sir, we did. [256]

Q. And technically he is in command, isn't that correct, even though it is your boat usually?

A. No, sir. I am in charge of the boat. He being the senior officer present would naturally outrank me. However, the operation of the boat is left up to me.

Q. Where were you when you first heard this call from the Melody?

A. We were approximately four or five miles south of the river.

Q. Did you hear the Stampede make the call, or did you hear the call relayed from your Coast Guard station?

A. No, sir, I didn't. At the time we were not maintaining a radio watch, due to having slight

(Testimony of Donald William Shaw.)

difficulties with our receiver, and so we didn't hear the radio calls.

Q. You got your word then from the Coast Guard station?

A. Yes, sir. We were directed by the station to proceed and use the lifeboats.

Q. What kind of a boat is the Triumph?

A. The Triumph is a 52-foot boat, approximately 36 net ton, 160 horsepower Diesel engine. She is built exclusively for lifesaving at a cost of $87,000.

Q. That is the boat you frequently use in operations of this kind? A. Yes, sir.

Q. About what time did you reach the Melody and the Stampede?

A. 17:50; that is 5:50 p.m. [257]

Mr. Bowerman: What was that time, please?

A. 5:50, I believe.

Mr. Tatum: Q. And at the time you got there about where were everybody?

A. In the approximate position indicated by Chief Jensen, 279 degrees true, approximately six or seven miles from North Head.

Q. How many other Coast Guard boats were there at the time you arrived?

A. At the time we arrived there were two motor lifeboats on the scene.

Q. And the Stampede?

A. And the Stampede.

Q. And the submerged Melody?

A. Yes, sir.

Q. And was that all? A. That was all.

(Testimony of Donald William Shaw.)

Q. Mr. Jensen said there were two Coast Guardsmen aboard the Melody at the time you arrived; is that right? A. Yes, sir.

Q. Did you throw them a line and make them secure to the Triumph?

A. When we arrived we noticed, when we were approximately a mile away, that the Stampede turned around and headed back to the Melody, and when we arrived as they were engaged in [258] putting the Stampede's line back aboard the Melody the 36-foot lifeboat had a line on the Melody and we stood by until we had that line secure so we made them pass a port line also.

Q. And so you did? A. Yes, sir.

Q. What did the other lifeboat do at that time?

A. Which other lifeboat?

Q. Two Coast Guard lifeboats were out there?

A. Yes.

Q. The one commanded by Mr. Jensen?

A. Yes.

Q. That was attached to the Melody?

A. Yes.

Q. What did the other boat do?

A. The other boat stood by to render such assistance as she might do.

Q. And did it stand by the whole way in?

A. Yes, sir, until we——

Q. Until you reached this later point. About what time did you start towing the Melody to the Columbia River?

(Testimony of Donald William Shaw.)

A. I looked in the ship's log, that I passed my towline aboard at 18:30.

Q. And what time did you get under way?

A. At that time within two or three minutes, as soon as the line was secured. [259]

Q. About 6:30?

A. Approximately 6:30, yes, sir.

Q. Then the testimony has been as you rounded into Peacock Spit something happened to that Stampede's wheel. Will you explain that. Explain what happened then.

A. Well, we were heading in along the north side. One of the reasons we were set a little on the north side was, there was a ship coming in the center of the channel from the life ship inbound and we stayed on the north side so that we would give her clearance, and when we were near No. 5-A buoy there was a man standing alongside of me at the wheel and we noticed that the Stampede stopped towing. She seemed to stop rather abruptly, and of course the events then took place pretty rapidly but we did receive a radio message from the Stampede that she was fouled on the bottom, or her towline was fouled, and I answered them on the radio at that time, and then we lost radio contact because of the fact that when something like that happens you don't have too much time to be talking about it over the radio, and there being a flood tide possibly the Melody drifted in a little bit and the Stampede started to take in her wire in an attempt to free herself so that we could proceed with the tow, and

(Testimony of Donald William Shaw.)

I remember at that time Mr. McCormack was aboard and I told him that I was going to sheer to the south, to give the Stampede all the clearance that I possibly could, but when he backed down—I don't [260] know whether he backed down with his engines or whether he just used the power of his windless to take in the hawser, and that took his boat back before we could sheer off. He went over our towline. We attempted to call him by radio and inform him of this, but naturally he was working on deck and working with his lines, and we did get in touch with him from the stern of the Triumph and told him he was over our towline. In a case like that there is nothing you can do but pay out the slack in your towline in the hopes it will sink deeply enough so he will ride over the towline and not foul, but as it turned out he fouled it in his screw.

Q. Did it break your line?

A. Whether it broke our line at that time I could not say. However, it was necessary to remedy the situation to cut the line.

Q. Had you changed your course in any way before he fouled his propeller in your line?

A. I had started to change my course. I put the wheel hard right, but the rudder hadn't had much time to take any effect.

Q. You started to change your course away from the Stampede?

A. That is right, to give clearance and get away so my line would not foul.

(Testimony of Donald William Shaw.)

Q. But your ship hadn't gotten away much? You had just given the order?

A. That is right. The thing happened so fast there wasn't [261] much time.

Q. Yes. You cut your towline; is that right?

A. We didn't cut our towline. Mr. Wuori brought the line up over his stern and got us free, and took up slack; then he cut the other end, got that free, and we passed along the other side and we bended the two ends together and proceeded along with the tow.

Q. Was Mr. Wuori on the deck of the Stampede at the time this boat went across?

A. Well, he was the captain of the Stampede and I assume he was on deck.

Q. You could not tell whether he was in the wheelhouse or on deck in back of the winch?

A. I could not tell the exact position, no, sir.

Q. Then did you again make your line fast to the Melody? A. Yes.

Q. What happened to the Stampede?

A. The stampede was left with her wheel fouled with a short piece of our hawser, and the other lifeboat which had been standing by took the Stampede in tow.

Q. At the time all this happened, and the location in which it happened, were you in more dangerous waters then than you were six or seven miles out at sea? Was the Melody in a more dangerous position when the wheel was fouled with the Stampede than it was six or seven miles out at sea? [262]

(Testimony of Donald William Shaw.)

A. Yes, sir, I would say it was.

Q. Then did you continue the tow?

A. We continued the tow, yes, sir.

Q. And beached it at the Coast Guard station at Point Adams? A. Yes, sir.

Q. Mr. Shaw, at the time, or after the Stampede had fouled its wheel, was it in the position of being able to continue the tow of the Melody?

A. With the fouled wheel?

Q. Yes.

A. If a vessal has the wheel fouled it is in no position to navigate himself, let alone another.

Q. In other words, did it have to be towed in, or was it able to go under its own power—the Stampede?

A. Well, the Stampede, left in the condition that it was, with the fouled wheel, it was necessary that it be towed.

Q. During this entire operation, Mr. Shaw, were there any particular hazards of the Stampede II in towing the Melody, bearing in mind there was a good slack of flood tide, under all the conditions then existing?

A. Well, I would say that no more than the ordinary hazards you would encounter in towing a derelict under similar conditions.

Mr. Wood: If there were any particular hazards? If there were any. [263]

Mr. Tatum: Q. What hazards were there, if any?

Mr. Wood: If any?

(Testimony of Donald William Shaw.)

A. Well, there was a hazard. He could possibly have damaged his gear. He did have a towline on it and he possibly could have damaged that. But no more particular hazards than you would ordinarily expect to encounter doing work of that nature.

Mr. Tatum: Q. When the Stampede fouled its line, did I understand you to say that you heard someone from the Stampede say that they fouled their line on the bottom?

A. Well, as I recollect, I think Mr. Wuori, if he operates his own radio, I believe that he talked to me, but I think there was some conversation going on between the crew members on deck, too, and when they stopped we deemed it was fouled on the bottom or fouled on something.

Q. What would cause the line to become fouled on the bottom?

A. What it might have possibly fouled on?

Q. What would cause the line to become entangled on the bottom?

A. The only thing that would cause the line to be fouled on the bottom would be the fact that the line was on the bottom, or, that is, near the bottom, which engaged some object.

Q. Would that be skillful maneuvering of the Stampede, to cause that, or would it be unskillful?

The Court: How would it act from towing?

A. Towing, sir?

The Court: How would it act on the bottom?

A. I believe Mr. Wuori was using wire to tow,

(Testimony of Donald William Shaw.)

and wire, having more water, and not being able to tell how much strain that Manila would take——

The Court: How much water was there?

A. I would say that in that particular spot probably—it would be from the north side, I would hazard, from fifty to sixty feet of water.

The Court: How much cable would be added?

A. In feet?

The Court: Yes. What is the testimony of fathoms?

Mr. Wood: Three hundred.

The Court: Three hundred fathoms?

Mr. Bowerman: How much cable did you have out?

Mr. Wood: One hundred fathoms.

Mr. Bowerman: He had a total of three hundred fathoms, he says, and one hundred of it was out.

The Court: How many feet in one hundred fathoms?

A. Six hundred feet, sir.

Mr. Tatum: Q. Mr. Shaw, would the school of towing have permitted that line to drag on the bottom?

A. That depends on the conditions that he is working against with his tow. I believe that the primary reason that the wire was slack was due to the fact that the wire was made fast to the Melody by a Manila component or strap, and not knowing just how much of a strain this Manila strap would take the Stampede II [265] was towing at reduced power, you might say.

(Testimony of Donald William Shaw.)

Q. You mean the Stampede II wasn't pulling as hard as the two Coast Guard boats?

A. That is hard to say. He was not pulling as hard as he was able to pull, due to the fact that he didn't know the strength of this Manila strap.

Q. Did your Manila line go under water, or was it taut from the Melody to your boat?

A. The towline is never taut. That is, it depends on the action of the sea, and the Manila line will go under the water a little bit, and when you run on a swell it will lift up and become taut, and then when you go back down the backslide or the swell it will slack off a little bit.

Q. Did the fouling take place while the Stampede was attempting to shorten its line, or did they attempt to shorten the line after they became fouled? A. After they became fouled.

Mr. Tatum: That is all.

Cross Examination

By Mr. Bowerman:

Q. Getting a line fouled there was one of the hazards of towing that boat in, wasn't it?

A. Possibly.

Q. Three of you coming up there more or less abreast would not be an ordinary procedure would it? [266] A. Pardon?

Q. I say, coming in, three of these boats being abreast and towing a derelict into that port, with other shipping coming and going, that would not be ordinary procedure, would it? It would be extraordinary?

(Testimony of Donald William Shaw.)

A. That would be ordinary procedure as long as you have fish boats coming in the river. That is what the Coast Guard is there for.

Q. As I say, you don't have three of them coming in there abreast at 11:00 o'clock at night?

A. Not necessarily.

Q. I see. Is that a matter that frequently happens?

A. Not necessarily. Usually only a possibility.

Q. Yes, but here you had three pulling on the same boat? A. Yes, sir.

The Court: And you had the chances of a flood tide there, too?

A. Yes, sir.

Mr. Bowerman: Q. That is right after the flood, as I understand it?

A. We had the benefit of the flood tide, yes, sir.

Q. And at that same time you were over toward the Washington shore because there was another larger vessel coming into port; is that the way it was?

A. We were in the main ship's channel and slightly on the north [267] side of the main ship channel.

Q. Why were you over there?

A. To give clearance to the ship.

Q. That is what I understood.

A. She was coming on the ranges and we were off the ranges a little bit but still in the main channel.

Q. So that Mr. Wuori's entanglement of line in

(Testimony of Donald William Shaw.)

his propeller, was just another one of the hazards of bringing this boat in? It is not usual but it happened? A. It happens, yes, sir.

Q. Just like the Melody was out in the ocean and tipped over on her side. That does not happen every day there, does it?

A. No, sir, it does not happen.

Q. But it happened to them?

A. Yes, sir.

Q. One of the hazards of the sea?

A. Yes, sir.

Q. Sometimes it happens and sometimes it doesn't. I didn't get your name. A. Shaw.

Q. Shaw? A. Shaw; S-h-a-w.

Q. And what is your first name?

A. Donald.

The Court: Donald is a little Scotch. Put the two names [268] together. That is all.

Mr. Bowerman: Q. You were coming back from Tillamook Rock? A. Yes, sir.

Q. And you got word from the Coast Guard about this accident to the Melody?

A. Yes, sir. The message we received stated to proceed to the position and assist the lifeboats with the tow. At that time I don't think it was clearly understood just exactly what had taken place.

Q. And you arrived out there about 5:50, as I understand you? A. Yes, sir.

Q. And you found the Triumph—and you found the Wuori boat there with a line attached to the Melody?

(Testimony of Donald William Shaw.)

A. Not at the time we arrived, no, sir. At the time we arrived the Stampede was engaged in putting a towline back aboard the Melody. They just completed the operation after we arrived.

Q. But that is after their line had become detached and they put it back again?

A. Yes, sir.

Q. As you understood it? A. Yes, sir.

Q. And the Coast Guard boat had two men on the Melody at the time? A. Yes, sir.

Q. They had fastened their line and refastened the Wuori line? [269] A. Yes, sir.

Q. Now as I view it, you got your own line attached at about 6:30?

A. Approximately that time, yes.

Q. The Coast Guard requires you gentlemen to keep a record of what you do so that you have what you call a log of it?

A. I maintain the ship's log. It is what we term a rough log, and it is mainly used as a reference concerning the movements of the boat, but it is in no way an official log; that is, copies are not submitted to our headquarters, or anything in that manner.

Q. It is for personal record?

A. It is for a record of the boat.

Q. Is it something that you leave with the boat? If you would be transferred would you leave it there or take it with you?

A. I would leave it on the boat. Possibly the

(Testimony of Donald William Shaw.)

next man would maintain it in a little different fashion. That would be up to him.

Q. Do you think there is any record of this radio conversation, that that was filed? Did you put that in your log? A. No, sir, I didn't.

Q. And have you got anything in your log showing the time when Mr. Wuori said that he wanted to shorten up his cables, whatever you call that?

A. There is no entry in the log to that effect, but we would [270] have an entry of the fouling of the cable, and then all the other events that took place. But just the fact that at such a time the Stampede II's towline fouled a beam, that is all that we entered.

Q. You have the time?

A. We have the time, yes.

Q. When the towline fouled a beam?

A. Yes, sir.

Q. And what was that?

A. I have a copy of it right here, sir, and I look at it as being 22:45.

Q. What does that mean?

A. That would be 10:45 p.m.

Q. 10:45. When do you make these entries, Mr. Shaw, with reference to the occurrence?

A. Well, in a case like that——

Q. I mean, when did you make this entry, if you remember? A. If I remember?

Q. Yes.

A. I believe I made that entry when we were safely in the river, or possibly I made it when we

(Testimony of Donald William Shaw.)

come up to the beach. I made a notation of it on a tablet or a small book there, but then the entry into the log was possibly made when we returned to the dock.

Q. Where are you stationed, on the river or down at Tillamook? [271]

A. On the river, at Point Adams.

Q. And you service the station—you boat services the station down at Tillamook Rock?

A. Yes, sir, at Tillamook Rock. We transport personnel and supplies to and from Tillamook life station.

Q. Now as I understand you, the Stampede, according to your belief, fouled its towline on the bottom of the river?

A. That is what I believe happened, yes, sir.

Q. And then in some way got your towline fouled in its propeller?

A. Our towline was fouled in their propeller, yes, sir.

Q. And that occasioned the cutting of both of these lines? A. Both his line——

Q. And your line?

A. No, sir. I believe that Mr. Wuori slipped his entire cable in the hopes that it would stay attached to the Melody and that when she was beached he could recover it.

Q. Oh.

A. And our line it was necessary to cut, too, from Mr. Wuori and get him into position where he could be helped on in.

(Testimony of Donald William Shaw.)

Q. Either you or the other Coast Guardsmen I think testified that the next day there was no line on this winch?

A. That is what I have been told. However, I didn't examine the Melody. I went back out to sea.

Q. No. I mean, you assume that all of his line was cut loose [272] from Wuori's boat?

A. I assumed that it was, from what I have heard.

Q. Yes. And when the Melody was beached I believe they didn't find the entire line there?

A. I believe that, yes, sir.

Q. Yes. But in any event, it is your idea that his towline was fouled on the bottom first?

A. Yes, sir.

Q. And later your towline was fouled in his propeller? A. Yes, sir.

Q. And that necessitated or resulted in his towline being detached from Wuori's boat and your towline being cut off so you could get loose from the propeller, and later it was again fastened onto the Melody? A. Yes, sir.

Q. And you proceeded with the tow?

A. Yes, sir.

Mr. Bowerman: That is the way you understand it. I believe that is all.

Mr. Wood: If your Honor please, could I have permission to ask a few questions, not many?

The Court: Yes.

(Testimony of Donald William Shaw.)

Redirect Examination

By Mr. Wood:

Q. I don't want to embarrass you or Mr. Wuori, but I do want [273] the actual facts, whoever they hurt or help. Now, first, I am going to tell you this: That yesterday Mr. Wuori testified that the reason your line got fouled in his propeller was that you crossed his bow from starboard to port and that in his opinion that was bad maneuvering on your part.

Mr. Bowerman: Now I submit, your Honor, that is unfair, and it is not in the record. There was nothing of that kind said.

Mr. Wood: I will leave it to the Court.

Mr. Bowerman: Counsel has no right to try to prejudice it.

Mr. Wood: Doesn't your Honor remember the testimony?

The Court: Somebody asked a question like that. Whether it was answered or not I don't know. There is no dispute, I take it, that yesetrday it was testified that the Triumph was across his bow.

Mr. Bowerman: No, I am not questioning that, but I do question——

Mr. Wood: I won't take time to go back to the record——

Mr. Bowerman: I know, but when you come in here and make a statement like that in this court you ought to apologize to everybody around here.

Mr. Wood: I don't think so. I claim it is on the record.

(Testimony of Donald William Shaw.)

The Court: All right, but on the basis——

Mr. Wood: Leave it out.

The Witness: I would say—— [274]

The Court: You wait. You haven't been asked a question.

The Witness: All right, sir.

Mr. Wood: Q. Is it a fact that you crossed his bow from port to starboard? A. No, sir.

The Court: Starboard to port?

A. Starboard to port; that is correct.

Mr. Wood: Q. Starboard to port. Was that the fact? A. Yes, sir.

Q. Now is it your honest judgment—that is what we have got to have—that a skillful tow master would have permitted his line to get fouled on the bottom?

A. I don't believe there is a skillful tow master in the world that has not made a mistake.

Q. No; I think that is right, but that is hardly an answer to my question. I want to know if Captain Wuori had navigated his boat with ordinary skillful seamanship at that time, would his line have fouled the bottom, in your opinion?

A. I think that Mr. Wuori was navigating his boat and I will say that he was attempting to navigate it to the best of his ability.

Q. Yes, I have no doubt he was, but that is not an answer to my question.

The Court: What were you going to say a minute ago when you turned to me? [275]

A. Well, this matter of who is a good boatman

(Testimony of Donald William Shaw.)

and who is not a good boatman, the only thing I can offer in my defense is that Lieutenant McCormack—I was in charge of the boat; I was in charge of it, and he is Lieutenant in the Coast Guard and has been in the Coast Guard for twenty-four years, and in later discussions of the handling of the towing of the Melody there was never at any time any revocation made of the way I handled the Triumph.

Q. No, I don't think there was.

A. And he was aboard the Triumph and observed practically every turn of the wheel.

Q. Well, would ordinary skillful maneuvering on the part of the Stampede II have permitted your line to foul his propeller?

A. I think another factor is to be put in there. Wuori's claim is that he had shortened his line, and that they all did it at that time.

Q. Is that a fact? Were you all shortening your lines at that time?

A. Myself, I would consider it unsafe for two boats to shorten their lines at the same time.

Q. Is that what you were doing?

A. We were not shortening any hawser, no, sir. We were attempting to stay clear of the Stampede wheel but shortened his hawser and we may have later shortened our hawser but I was not attempting to shorten my hawser while he was shortening [276] his.

Q. Considering the operation you were giving, by veering off to the starboard, as you testified, was

(Testimony of Donald William Shaw.)

it ordinary, skillful maneuvering, for him to back over the line?

The Court: Well, he doesn't have the other factor in there yet.

Mr. Wood: Well, what is it, your Honor?

The Court: Well, do you concur, or do you deny, or what is your position about, Wuori's statement that it was proposed to the flotilla that they all shorten their lines on account of the approach to the nearness of the mine fields?

A. Well, if that was suggested by Mr. Wuori I would have refused to do so, because that is not a position that we ordinarily shorten line to take a tow through the mine field.

The Court: Well, you don't remember that suggestion, if it were made? You didn't hear it?

A. I think, as I recall, Mr. Wuori was going to take in his line, but the reason he was going to take it in was to attempt to free his line from the bottom.

Mr. Wood: May I ask a question?

The Court: Oh, certainly, Mr. Wood.

Mr. Wood: Q. We still haven't got an answer to this question. If you say you can't answer it it is O.K. with me, but I want to know it if you can answer it. In your opinion as a seaman, was it skillful maneuvering on Wuori's part to foul [277] his propeller in your line?

Mr. Bowerman: That, if your Honor please, does not take into account—that is, allow the witness to take into account conditions as they existed there at the time.

(Testimony of Donald William Shaw.)

Mr. Wood: He was there at the time himself.

The Court: Well, Gentlemen, I understand where your ideas don't mesh. You start from different points. He says whatever happened resulted from his proposal that they all shorten their lines and that he was starting to do that himself. This man says he heard no such proposition and he would have rejected it if it had been made. So I understand that they start from different points. Mr. Wood is examining the witness based on his theory, which is there was no such proposal made by Wuori.

Mr. Bowerman: That is not the question. The question is whether it was skillful maneuvering and he had tangled up in his line.

Mr. Wood: That is what I want to show.

The Court: He is asking that on the basis Wuori was hauling away there and he wasn't shortening the line.

Mr. Wood: Q. Would you say, sir, the ordinary master operating his boat with the ordinary skill would have fouled his propeller in your line?

A. I would say that under the circumstances, his line being fouled on the bottom, that even though he may have used all [278] the seamanship that was possible for him to use, he still may have fouled my line, and I possibly having the right to my opinion could say that it was poor seamanship and he could say that it was not. So it is a matter of personal opinion, and my opinion is that it was a pure accident.

Q. Yes. And you don't know what caused his line to foul the bottom?

(Testimony of Donald William Shaw.)

A. I don't know what caused his line to foul the bottom.

Q. Now I want to ask you about a different subject. Was the Triumph line of sufficient power to tow the Melody in?

A. Yes, sir, I believe it was.

Q. And was the other Coast Guard boat also of sufficient power to tow her in?

A. I believe that the motor lifeboat could have brought her in by herself, with the aid of the tide.

Q. So that either the Triumph or the other boat could have brought the Melody in?

A. I know the Triumph could, and if I had been alone in the motor lifeboat I would have tried it.

Q. Now I want to ask you whether, after the two Coast Guard boats got ahold of the Melody, whether the Stampede II was in assistance of the towing or whether you really could have got along better without it?

A. I can only say this: That Chief Jensen, in charge of the other boat, and myself, have had considerable experience towing [279] together, you might say, as a team. Due to that reason we possibly could have worked just as well without the aid of the Stampede. We had the power and we had the boats.

The Court: You had authority to make Wuori, as a civilion, let go, didn't you?

A. That is a little questionable. I believe that we do have.

The Court: It is a question, I know.

(Testimony of Donald William Shaw.)

A. If we at any time felt that he was, by his actions, further endangering the boat, we could order him to release his line and take over active control of the situation.

Mr. Wood: Q. Well, if he had rolled up his wire and pulled out of the way, wouldn't you have been better off?

A. I can only say this: That as long as we fouled the bottom it would appear that we would have been.

Q. Only one more question. Which boat was it that——

The Court: Don't answer. Too many ifs. What about the two hours before you got there?

A. Pardon?

The Court: What about the two hours before you got there, when he had hold of her alone?

A. Well, he had hold of her alone but there was very little progress made.

The Court: Might she not have sunk?

A. You say she may have sunk?

The Court: I didn't say that. I say, might she not have [280] sunk?

A. Well, she was afloat and it is my opinion that she would have stayed afloat for some time.

The Court: For the two hours?

A. Yes, sir.

Mr. Wood: Q. Now which boat was it that towed the Stampede II in?

A. That was the Cape Disappointment motor lifeboat.

Mr. Wood: That is all.

(Testimony of Donald William Shaw.)

Recross Examination

By Mr. Bowerman:

Q. You saw the boat, of course, only in the condition in which it was when you got up there?

A. Yes, sir.

Q. And during that time, according to your information of Wuori's boat, it had a line on it and was making as much progress as it could?

A. They had just completed putting a line on and he was just starting to put power on the boat.

Q. Yes. But it is your understanding, is it not, that for a considerable part of that two hours he had been towing the Melody?

A. It was my understanding that there had been attempts made to tow the Melody, yes, sir.

Q. Not only attempts but they had actually towed it, hadn't [281] they, when they broke their connection?

A. Yes, sir. I believe he had made some progress at that.

Q. Yes. It wasn't any swift trip even after all three of you got hold of her?

A. No, it wasn't.

Q. Your progress was about how much an hour, do you think?

A. Well, we started to tow at approximately 6:30 and we must have beached the boat at, I would say, a half an hour after midnight, so it would appear from that that slightly over two miles per hour, or two and a half——

Q. With practically all three of you?

(Testimony of Donald William Shaw.)

A. Yes, sir.

Q. And a flood tide coming in? A. Yes.

Q. In other words, under all of the circumstances the speed of the boat was about two miles an hour?

A. I would say two and a half, whatever it is.

Q. Two and a half, whatever it is. Now Wuori was there in charge when the Coast Guard boats got there?

A. He was there when we arrived, yes, sir.

Q. It is your understanding he was there when the other two arrived? A. Yes, sir.

Q. They were there when you were there, weren't they? A. Yes, sir. [282]

Q. It is your understanding he was there when all of them were there? A. Yes, sir.

Q. Now none of them suggested to him that he should quit and let loose?

A. No, sir. There was no reason suggested to.

Q. There was no reason for that, that you know of? A. That was up to Mr. Wuori.

Q. Yes. And he was there, and he did nothing, in your judgment, which would have warranted you in taking the boat away from him?

A. No, sir.

Mr. Bowerman: That is all.

Mr. Wood: That is all, Mr. Shaw.

The Court: The crash boat?

A. The crash boat, sir. It may have been possible. She had lots of power, more than any of us, so far as horsepower.

The Court: Anything else enter into it?

(Testimony of Donald William Shaw.)

A. Well, you mean a boat that is built for speed mainly to answer plane crashes? She is not as heavily built and is built for towing as much as the lifeboats.

Mr. Wood: For your Honor's information I think I ought to tell you we expect to have the master of the crash boat here tomorrow.

Mr. Bowerman: Q. Do you know the depth of water out there [283] where the Melody was when you arrived? Did you take the soundings?

A. I didn't take soundings, no, sir.

Mr. Bowerman: That is all.

(Witness excused.)

Mr. Wood: If your Honor please, except for the skipper of the crash boat, who will be here in the morning, we have no more witnesses.

The Court: What do you want to do on your side yet tonight?

Mr. Bowerman: I beg pardon?

The Court: He has closed, except for the skipper of the crash boat, who will be here in the morning. What can you do on your side yet tonight?

Mr. Bowerman: Do you gentlemen have the time when this boat was put up here in this boat yard?

Mr. Wood: No, we haven't it, unless Mr. Rustad has it. I will be glad for him to state it, if he knows.

Mr. Rustad: No, I haven't it.

The Court: No, we haven't that time.

Mr. Bowerman: If your Honor please, I don't doubt we can make headway during the night. We are about to have a very little rebuttal.

(Testimony of Donald William Shaw.)

The Court: I have another case for ten in the morning. I had better set it up to two, I guess. I think we ought to [284] be able to get through in the morning?

Mr. Wood: Oh, yes.

The Court: What do you think? You will get through in the morning?

Mr. Bowerman: Oh, I think so.

The Court: Well, of course, you will want to argue the case?

Mr. Wood: Yes.

The Court: You are both good talkers. In times past you would both like to talk.

Mr. Bowerman: You say the time has passed when we——

The Court: Oh, no; I didn't say the time was passed.

Mr. Bowerman: I was going to agree with you.

The Court: I say in times past you have talked, and I have enjoyed hearing you. It will be nice for you to get through in the morning, because I am going to ask Mr. Bischoff and another gentleman to come at two o'clock tomorrow. All right; ten in the morning.

Mr. Bowerman: Can we have it understood we can inquire from Kern & Kibbe about those dates?

Mr. Wood: Yes.

(Thereupon, at 4:20 o'clock p.m., court was adjourned until tomorrow morning at 10:00 o'clock.)

Wednesday, October 31, 1945

Court convened at 10:00 o'clock a.m., and, after disposing of other matters, resumed proceedings herein at 10:28 o'clock a.m., as follows:

Mr. Wood: If your Honor please, I wish to state personally a little matter personal to myself before we call a witness. Yesterday, when I stated that Mr. Wuori had testified that the fouling of the Triumph's line with the Stampede's propeller was due to neglectful maneuvering on the part of his client Mr. Bowerman said I was misquoting the record and behaving in an improper manner. Now I think I am as sensitive about my behavior and my manner as any man here. Mr. Wuori having so testified, it was necessary to have that statement contradicted and I asked Mr. Shaw, the Coast Guardsman, the question in order that he could contradict it, which he did. I was accused of misquoting the record. I, therefore, had the record transcribed. I am going to pass on copy to your Honor, through the Clerk, and I am going to read the other.

This was my cross examination of Mr. Wuori:

"Q. Now do you claim that the reason the line fouled was because the Triumph crossed your bow?

"A. Yes.

"Q. And you claim that was bad maneuvering on the part of the Triumph?

"A. Well, yes, I do." [286]

Now it was said yesterday that I owed everybody in the courtroom an apology, and when I have to apologize I think I know when to do it. I think if

(Testimony of Thomas Rustad.)

any apologies are due this morning they are not from me.

Mr. Bowerman: Well, if your Honor please, it is obvious I am the one that owes an apology. I didn't hear it. I didn't hear that, and I did speak with some feeling and I apologize to counsel and the Court.

Mr. Wood: I accept it.

Mr. Bowerman: And all others present.

The Court: We are starting with a clean slate, then. Call a witness, somebody.

Mr. Wood: Mr. Gaither is here and I am going to recall Mr. Rustad for one question before Mr. Gaither. Mr. Rustad, there are two questions I want to ask you.

THOMAS RUSTAD

was thereupon recalled as a witness in behalf of the Respondents and further testified as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Rustad, when you came back to the Melody in the crash boat and Mr. Wuori and his Stampede were there, what, if anything, was said to you by Mr. Wuori about insurance at that time? I am not talking about the time on the beach later.

A. When I first came up there I think one of the first things that Mr. Wuori said, that I didn't

(Testimony of Thomas Rustad.)

recall yesterday, was that [287] he asked, I imagine me in particular, that if I had insurance.

Q. And did you make any reply?

A. I don't recall that I did.

Q. Now there is another question I want to ask. When you were drifting there in the rubber life raft, I think you estimated yesterday a mile and a half away from the Melody, didn't you?

A. Yes, sir.

Q. Could you see the Stampede II at all times?

A. Yes, sir.

Q. Did you see her make any of these two circles that she claimed to have made around the Melody?

A. No, sir.

Q. If she had made two circles around the Melody a half a mile distance from the Melody, which is what Mr. Wuori testified—he said the circle was a mile in diameter—if any such circles were made and really a search made, was the state of the weather and the waves or the sea such as they should have seen you and your life raft?

Mr. Bowerman: That is objected to as calling for a conclusion and taking over the province of the Judge.

The Court: He may answer, subject to the objection.

A. Yes, I would think that they would, if they were searching for anything.

Mr. Wood: That is all. [288]

(Testimony of Thomas Rustad.)

Cross Examination

Mr. Bowerman:

Q. Mr. Rustad, you had a two-way radio on your boat? A. Yes, sir.

Q. And you didn't use that?

A. We were unable to, sir.

Q. I asked you whether you used it?

A. No, sir.

Q. Did you make any effort to use it?

A. How could we, sir?

Q. I asked you whether you made any effort to use it. A. No, sir.

Q. You were there. I wasn't there.

A. No; and if you were there you would know.

Q. Well, did you go to the back end of the boat after you got off of it? A. I did not, sir.

Q. Did you make any attempt to?

A. We took the crew off.

Q. I say, did you make an attempt to go back on your boat after you got off of it?

A. No, sir.

Q. The radio was in the pilothouse?

A. Yes, sir.

Q. What did Mr. Wuori say to you about insurance at this time [289] as you now remember it?

A. At the time we came up on the crash boat?

Q. Well, at the time you just now told about, whenever it was.

A. Well, that was the question I didn't recall yesterday, and he asked me, that is to say in particular if we had insurance.

(Testimony of Thomas Rustad.)

Q. And you told him that you did or you didn't tell him anything?

A. I said I didn't recall what I said.

Q. But you remembered what he had said?

A. Yes.

Q. But you didn't think of that yesterday?

A. Well, you can't think of everything.

Q. I am asking you. You didn't think of it yesterday? A. No, sir.

Q. And you do not now know what your reply was?

A. If I may say so, I don't think I said anything.

Q. Well, I ask you if you remember, because you twice testified you didn't remember what was said; is that right?

A. Yes, that is what I said.

Q. Yes. That is when you were in this crash boat with the Coast Guard officers and your own crew? A. Yes, sir.

The Court: What happened to the rubber life raft?

A. The Coast—that is, the crash boat picked it up and carried it with us into Point Adams to the place we were picked up. [290]

The Court: Was it trolling behind?

A. No. We pulled it aboard.

Mr. Bowerman: If your Honor please, I have one question that probably will be improper cross examination now, but I wanted to recall this witness for it anyway. It pertains to his original examination. I would rather ask him now than recall him.

(Testimony of Thomas Rustad.)

The Court: He may answer.

Mr. Bowerman: Q. Mr. Rustad, did you ever pay, or offer to pay, Mr. Wuori anything for his time, expense or trouble, or anything else, in connection with what he did to your boat, the Melody?

A. No, sir. That is out of my hands.

Q. Well, again I ask you whether you did or offered to pay anything? A. I said no, sir.

Q. And why do you say it is out of your hands?

A. It is covered by insurance, sir.

Q. I see. When you left the boat it was up to the insurance company? Is that your idea?

A. I would not say that, sir.

Q. Why do you say paying the expense, for instance, of the telephone messages that got relief out there? You haven't even offered to pay that, have you?

A. I never made any arrangements with him, in the first place. [291]

Mr. Bowerman: Yes. That is all.

Redirect Examination

By Mr. Wood:

Q. As a matter of fact, I thought it was in the libel here, but, as a matter of fact, Mr. Wuori placed his case in the hands of Mr. Fulton almost immediately after this, didn't he? A. Yes, sir.

Mr. Wood: That is all.

(Testimony of Thomas Rustad.)

Recross Examination

By Mr. Bowerman:

Q. You say that Mr. Wuori placed his case in Mr. Fulton's hands almost immediately after the wreck? A. The next day, sir.

Q. The next day?

A. As far as I could understand.

Q. Did Mr. Wuori tell you that?

A. No, sir.

Q. Did Mr. Fulton tell you that?

A. No, sir.

Q. Now how long was it after this boat was brought up to Astoria and the fish taken out of it before it was brought to Portland?

A. It was towed from Astoria on Friday afternoon following the accident. That would be the 27th, I believe, or 26th.

Q. You say it was towed to Astoria? [292]

A. Towed from Astoria to Portland.

Mr. Bowerman: Oh, to Portland. That is all.

Mr. Wood: That is all.

(Witness excused.)

Mr. Wood: Call Mr. Gaither, please.

The Clerk: State your name, please.

Mr. Gaither: William Gaither.

WILLIAM GAITHER

was thereupon produced as a witness in behalf of the Respondents and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Gaither, you are a member of the United States Coast Guard, are you not?

A. Yes, sir.

Q. You have to speak up loud so the Reporter can take it down in his notes. A. Yes, sir.

Q. And at present you are stationed at Point Adams? A. Yes, sir.

Q. And what has been your previous Coast Guard experience and instructions?

A. I have been in Coast Guard stations for eleven years.

Q. Whereabouts? [293]

A. I was a year at Point Adams. I was three years at Cape Disappointment; two years at Tillamook, and then I was stationed at temporary duty with the Navy at Astoria.

Q. And you were the man in command of the crash boat that went out to this rubber life raft, were you not? A. Yes, sir.

Q. Tell a little about the crash boat, the dimension, size and speed and power.

A. The crash boat is 63-foot, being built prim-

(Testimony of William Gaither.)

arily for saving lives of fliers or people in distress at sea. It is not equipped for any kind of salvage work except for planes.

The Court. What?

A. Except for planes.

The Court: Except for planes?

A. Yes, sir. It is fairly fast. It makes thirty-three knots. A square-turn boat, it has a place in the boat for taking care of injured or hurt personnel. It was built for the Navy, just for our sea risk work.

The Court: What you are saying is quite interesting to everybody and I would like for you to talk so everybody in the courtroom can hear you.

Mr. Wood: Yes. Talk louder, Mr. Gaither.

The Witness: Well, there is not much more to say.

Q. No, but in the future, in any of the rest of your testimony the Court wants you to speak up a little higher and a little [294] louder. I will stand over here and if you will talk so I can hear it way over here maybe we will all hear it. How many men in your crew on the crash boat?

A. Nine men, counting myself.

Q. What caused you to go out to the life raft? What word did you get?

A. There was a couple of Navy planes on patrol and they saw these men in the life raft. They called the station and reported and we responded to their call.

Q. Were you at the station when that patrol call came in?

(Testimony of William Gaither.)

A. I was on the boat tied up at the station.

Q. And in response to that call you started out?

A. Yes, sir.

Q. What time did you leave the station?

A. Just a couple of minutes before three o'clock.

Q. And what time did you get out to the rubber life raft?

A. It was just a few minutes before 3:30.

Q. And approximately where was the rubber life raft at that time, do you know?

A. It was between five and six miles northwest of North Head, in the approximate vicinity; five to six or seven, something like that.

Q. And at the time you reached the rubber life raft could you see the Stampede?

A. Yes, sir. [295]

Q. How far away do you think she was?

A. Possibly two miles. I would not say for sure. I didn't take any accurate measurement, but about two miles.

Q. No. Now what did you do when you reached the life raft?

A. We picked the men in the life raft up.

Q. And the raft itself, also? A. Yes, sir.

The Court: Will you pardon me?

Mr. Wood: Yes, sir.

The Court: With relation to the Stampede, was she tied close to the Melody at that time?

A. Well, we were not paying any particular attention. You could not be sure as to whether the

(Testimony of William Gaither.)

Melody was here or not, because she was very low in the water.

Mr. Wood: Q. This was about 3:30, you say, when you reached the raft?

A. Just about 3:30.

Q. Then what did you do after you picked the men on the life raft boat up?

A. Then we proceeded over to where the Stampede was.

Q. And how long did it take you to get over there?

A. Well, in the neighborhood of five minutes, or a little less. Not a great deal.

Q. The sea was fairly smooth, was it not?

A. That is right. [296]

Q. So you could make whatever speed you wanted to?

A. The sea had no control over the speed whatever. It was a very light—well, light to moderate ground swell.

Q. When you got to the Melody the Melody was there on her side, half submerged, wasn't she, or more than half submerged?

A. There was a little of the stern and just a little of the wheel that was sticking out of the water.

Q. Yes. And the Stampede was there beside her?

A. It was laying right close to her.

Q. Right close to her. Now what, if anything, had the Stampede done——

The Court: Why did he make for the Stampede?

(Testimony of William Gaither.)

Mr. Wood: Yes.

Q. Why did you go over there?

A. Well, we had the crew of the boat and they were interested in their boat, so we took them there so we could see if they could be of any assistance.

The Court: How did they know where the Stampede was?

A. The Coast Guard rescue planes had come out on the same mission we were and we asked them could they see the sunken hull of the Melody and they reported the boat was a fishing boat to the west of that, and the only boat in the vicinity at all was the Stampede.

Mr. Wood: Q. Now when you got over to the Melody and the Stampede did the Stampede have any line on the Melody at that [297] time?

A. They had a small line tied to the stern of the Melody.

Q. How small a line?

A. Well, it was about twenty-one or twenty-four thread, I would say from the looks. I could not say.

Q. Was it a line that would do for towing?

A. No, sir.

Q. It was too small for a towline, was it?

A. Too small for a towline.

Q. What was the attitude of Mr. Wuori at that time, so far as you could gather, about the claim, the boat? What was he going to do?

Mr. Bowerman: If the Court please, I object to that as calling for a conclusion. I submit the wit-

(Testimony of William Gaither.)

ness can tell what was said and what was done, but when you ask for a man's attitude——

Mr. Wood: I think, as I understand it, your Honor, it is like one of those cases where you can't describe all the little factors when you ask a man the cause of what happened at a certain time, but he can at least give his impression of it or give his opinion.

The Court: He can give it at the end. Give first what was said and done.

Mr. Wood: All right.

Q. What we want to finally arrive at Mr. Gaither is Mr. Wuori's [298] attitude about the whole business and we will lead up to that. I will ask you, first, what was said by Mr. Wuori, or you, or Mr. Rustad, that you remember?

A. Well, I didn't do very much of the talking to Mr. Wuori, because the place where you control the boat is inside the wings on the flying bridge and you can't hear very good with the engines running. I had a man up in the bow with a megaphone and when we come up Mr. Wuori wanted to know if we would put a line on the boat.

The Court: Put a line where?

A. A line on the boat.

The Court: On the Melody?

A. On the Melody, and probably with the idea of towing the boat, so I informed my men on the boat that we could not tow—they were not equipped for towing the boat and that at the time was all that was said at that particular time.

(Testimony of William Gaither.)

Q. That is all that was said at that particular time?

A. As far as I remember, yes, sir.

Q. Was anything said subsequent to that?

A. Well, after we were there Mr. Wuori had a man on the boat that pulled up right close to the Melody and we put Mr. Rustad's rubber life raft back in the water and Mr. Rustad and one of the men of my boat got in the rubber life raft. They went over to the Melody and I instructed them to fasten our anchor line on some secure place on the Melody in the event that it [299] should sink so we would have something substantial for salvage if she did sink.

Q. You mean to mark her place?

A. That is right; and something to lift with. But the bow of the boat was so far under that there was no chance to secure the line any place, and the Stampede had their line on the stern of the boat, so I told them since their line was on the boat that we could not interfere.

Q. You mean the lead line?

A. Well, after we didn't help them any as far as getting a line on, then they secured a larger line on it.

The Court: Who did you tell that you could not interfere?

A. We didn't tell anybody we could not interfere but it wasn't our business——

The Court: Well, wait. You just used that expression. I don't want to bother you in any way,

(Testimony of William Gaither.)

and I may have misheard you. You just said that you told them you could not interfere.

A. That was Mr. Rustad and the man in the rubber life raft.

The Court: That is what you told them?

A. When they said there was no place to secure a line on the bow, we could not interfere back there where they were.

Mr. Wood: Q. Now was anything said? We are still pursuing the subject of any conversation that was passed between anybody. What else, if anything, was said?

A. Well, Mr. Wuori was talking to the men in the life raft and [300] I could hear parts of it but I would not be able to say for sure, but there was a question of insurance came up.

Q. You heard that?

A. I heard the question of insurance. What was said about it I don't know.

Q. Did you hear Mr. Wuori ask about it?

A. Mr. Wuori asked if there was insurance. That is when Mr. Rustad and my men were in the rubber life raft.

Q. How long did you stay around there?

A. We were there from about twenty minutes to four until about quarter to five.

Q. Nearly an hour, then?

A. A little over an hour.

Q. Yes, that is right. And you stayed there until you saw the Triumph and the other boat approaching, didn't you?

(Testimony of William Gaither.)

A. Not the Triumph. We saw there was two small motor lifeboats from the Coast Guard stations coming out of the river. The Triumph was on another call at the time. I don't know what time she arrived there.

Q. I see. Now have you told everything that was said that you recall at that time that you were lying alongside there? A. As far as I recall, yes.

Q. And from what actions on the part of Mr. Wuori, like this little line of order and his talk—what did you gather as to his attitude? [301]

Mr. Fulton: About what?

Mr. Wood: If this were a jury trial there might be some objection to that question, but I don't think there is in an Admiralty Court.

The Court: Go ahead and answer, if you can.

A. Well, when we first came up to the boat Mr. Wuori wanted to put a line on there and he was informed that we could not help him tow. There was conversation passed back and forth and I could not understand the questions, or what he was saying, but the crew of my boat were very mad about it. Whatever he said made them mad. I could not say what it was; I won't try to repeat it, but just from what he stated to my men they were not interested one way or the other. I don't know what was going on or why it was being done but they didn't like the way he was acting.

Q. You didn't wait until the other boats came out and put their lines aboard to help tow, did you?

(Testimony of William Gaither.)

A. No, sir. We left as soon as they were in sight so we could see if they were coming.

Q. Then I take it that you don't know how far the Stampede towed the Melody in without assistance?

A. Well, for the time that we were there so towing the Melody, a little less than two miles, I would say.

Q. Oh. That is while you were still out there?

A. That is while we were there, in that vicinity, yes, sir. [302]

Q. And then you proceeded with the rescue men and the rubber raft into Astoria?

A. At Point Adams.

Q. Point Adams. Did you meet the Triumph coming out at all?

A. The Triumph was already out on another call in the river.

Q. Oh, on another call in the river. There was some talk yesterday about mine fields there in the inner part of the river. I don't want any false impression given about that. If you hit one of those mines would it explode? A. No, sir.

Q. Where are those mines in relation to being up where really boats would hit them or not?

A. The mines themselves were on the bottom.

Q. And how were they exploded?

A. From shore control.

Q. From shore control? A. Yes.

Mr. Wood: Your Honor, that is all I think of to ask this witness. I remember your Honor said

(Testimony of William Gaither.)

yesterday that you thought he should be brought up here. If anything occurs to your Honor to ask him I will be glad to have you do it.

The Court: No, I didn't say that, Mr. Wood.

Mr. Wood: Didn't you?

The Court: No.

Mr. Wood: Excuse me. [303]

The Court: I didn't say that.

Mr. Wood: My mistake, then.

The Court: Cross-examine.

Cross Examination

By Mr. Bowerman:

Q. Mr. Gaither, I don't think I got the exact time when you arrived and how long you were there. Will you please give it to me, sir.

A. I made a note of that from my log before I started up here. The exact time of the call of the men in the life raft, as reported by the plane, was 14:56.

Q. Is that according to the regular time?

A. That is four minutes to three.

Q. That is 3:56?

Mr. Fulton: 2:56.

Mr. Bowerman: 2:56.

A. We departed——

Q. Now what happened then? I didn't get that.

A. That was when a plane reported to the station that a life raft was drifting with men on it.

Q. Just a minute, please.

The Court: Were those men in bad shape at all that you picked up?

(Testimony of William Gaither.)

A. One or two of the men had been in the water and they were practically—— [304]

The Court: Shocked?

A. I would say there was a semi-condition.

Mr. Bowerman: Q. All right. What is the next?

A. We departed a minute later, 14:57. That is 2:57.

Q. O.K.

A. We arrived at the scene where the life raft was at 3:27.

Q. All right.

A. Then it took us about eight minutes—I didn't put any definite time down in the log but it took us about eight minutes to pick the men and the life raft up and get straightened around; then we proceeded to where the Stampede was and we arrived at the Stampede at 3:40.

Q. 3:40? A. 3:40.

Q. Yes, sir.

A. And then we stayed by the Stampede until 4:45.

Q. And then you left and you were not back there again? A. No, we never came back again.

Q. Now I didn't get a complete note on the time and the distance that you thought the Melody was towed by Mr. Wuori.

A. Well, I have no idea. I didn't pay any particular attention. He towed on the boat approximately forty-five minutes or a little less than an hour while I was there, while I could see, and the dis-

(Testimony of William Gaither.)

tance could have possibly been two miles. It wasn't any more. [305]

Q. Now, as I understand it, when you got there the Melody was under water, except part of the stern and a part of the top works there. What is it you call it? A. The wheelhouse.

Q. The wheelhouse. And the situation was such that you recommended or discussed the question of putting an anchor out so you would have something to pull it up with?

A. We wanted a heavy enough line so you would have something to work with.

Q. Yes. The station indicated to you that it might sink? A. It looked very probable.

Q. Very probable that it would sink; that is right? A. Yes, sir.

Q. Mr. Wuori asked you about assisting in the towing and you stated that you were not equipped for towing? A. Yes, sir.

Q. That is the fact. Did you know at that time, you or your crew know at that time that Mr. Wuori had radioed either to Astoria or directly to one of your stations, asking for help, and that was the reason that the other boats came out there?

A. We were on our way up to the life raft when we heard Mr. Wuori talking on the radio.

Q. You knew that he had asked for help?

A. That is right.

Q. And did you know that the help that came, outside of yourself, [306] was as a result of his request?

(Testimony of William Gaither.)

A. Well, we called the station immediately when we got there and requested that they send the boats out, and the boats had all been notified.

Q. Huh?

A. The boats had all been notified.

Q. Did you know it was as a result of the message from Mr. Wuori?

A. Well, I presume it was. I wouldn't say. I wasn't there.

Mr. Bowerman: That is all.

Redirect Examination

By Mr. Wood:

Q. Mr. Gaither, the situation being that you and your crash boat were lying alongside or standing by the Melody and Coast Guard boats already on their way out to tow her in, do you know why it was—if you do, or if anything was said, indicate it—why Mr. Wuori didn't take his line off and go on about his fishing?

A. I don't know why he didn't. I didn't talk to him.

Mr. Wood: All right. That is all.

Recross Examination

By Mr. Bowerman:

Q. The boat under tow is not as apt to sink as it would be standing still, is it?

A. How is that? [307]

Q. I say, this boat under tow and moving would not be as apt to sink as it would standing still, would it?

(Testimony of William Gaither.)

A. Well, I believe there is just as much chance, maybe more chance.

Q. More chance. Have you ever had any experience with anything of that kind?

A. With two boats that were sunk?

Q. Yes. A. Yes, sir.

Q. And towing them while in sinking condition?

A. If the boat is going to sink it will sink regardless, but I didn't know what condition the Melody was in, just gradually filling up with water as air was being released from the air compartments. I didn't know what air was in there or anything.

Q. Did they tell you there were fish in there, several tons of fish? A. Yes, sir.

Q. Anyway, Mr. Wuori did notify the Coast Guard he did tow the boat in?

A. He assisted part way.

Q. Yes. Well, you were in sight while they towed it practically two miles; is that right?

A. I wasn't there while it was being done.

Q. No. I say while you were there he towed it, without being bound to exact figures, you estimated two miles? [308] A. Yes.

Q. And you left while he was still towing?

A. Yes, sir.

Mr. Bowerman: That is all.

Mr. Wood: That is all. Thank you, Mr. Gaither.

(Witness excused.)

Mr. Wood: Respondents rest, your Honor.

Mr. Bowerman: That is all.

The Court: Argument.

Mr. Bowerman: We are willing, I think, to submit it without argument, or with argument, whichever counsel and the Court think will be most helpful.

Mr. Wood: I should think we would like to make a short argument.

The Court: I will hear you, Mr. Wood. Mr. Wood expects to talk, so do you want to talk first?

Mr. Bowerman: We will waive our opening argument.

(Thereupon argument was made to the Court by Mr. Wood, in behalf of the Respondents, and Mr. Bowerman and Mr. Fulton in behalf of the Libelants. The Court thereupon allowed the Libelants two weeks to file a brief, the Respondents one week thereafter, and the Libelants one week for reply brief, and court was adjourned at 11:33 o'clock a.m.)

REPORTER'S CERTIFICATE

I, Alva W. Person, official reporter, hereby certify that I reported the proceedings had before the Honorable Claude McColloch, Judge, in the above-entitled cause, beginning Monday, October 29, 1945, and ending Wednesday, October 31, 1945; that I thereafter prepared a transcript from my shorthand notes, and the foregoing transcript, pages numbered 1 to 309, both inclusive, contains a full, true and impartial record of all the evidence given, all objections and motions made, all rulings thereon and all exceptions taken upon the trial of said cause.

In Witness Whereof I have hereunto set my hand this 30th day of April, 1946.

/s/ ALVA W. PERSON,
Official Court Reporter.

[Endorsed]: Filed May 25, 1946.

[Endorsed]: No. 11341. United States Circuit Court of Appeals for the Ninth Circuit. Tom Rustad, Owner and Claimant of the Oil Screw "Melody" and Fidelity & Deposit Company of Maryland, a corporation, Appellants, vs. Charles Wuori, John Kurtti, Cyrus C. Christensen and Armand Syvanen, Appellees. Apostles on Appeal. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed May 31, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11341—Civil

Oil Screw MELODY and TOM RUSTAD, Owner and Claimant, FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation, Stipulator,

Appellants,

vs.

CHARLES WUORI, JOHN KURTTI, CYRUS C. CHRISTENSEN and ARMAND SYVANEN,

Appellees.

STATEMENT OF POINTS

The points on which appellants, Tom Rustad and Fidelity & Deposit Company of Maryland, a corporation, stipulator, intend to rely on their appeal herein are the same as those stated in their Assignments of Error, which are incorporated herein by reference.

/s/ LOFTON L. TATUM,
of Proctors for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed June 5, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER THAT ORIGINAL EXHIBITS NEED NOT BE PRINTED AS PART OF APOSTLES

Good cause therefor appearing, It Is Ordered that Libelant's Exhibits 1 and 2, being charts, need not be reproduced as a part of the printed Apostles on Appeal in above cause, but will be considered by the Court in their original form.

/s/ FRANCIS A. GARRECHT,
Senior United States Circuit Judge.

Dated: San Francisco, Calif., June 5, 1946.

[Endorsed]: Filed June 6, 1946. Paul P. O'Brien, Clerk.

No. 11341

In the United States Circuit Court of Appeals

For the Ninth Circuit

TOM RUSTAD, Owner and Claimant of the Oil Screw "MELODY" and FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation,

Appellants,

vs.

CHARLES WUORI, JOHN KURTTI, CYRUS C. CHRISTENSEN and ARMAND SYVANEN,

Appellees.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

WOOD, MATTHIESSEN & WOOD,
ERSKINE B. WOOD,
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STEVENS-NESS LAW PUB. CO., PORTLAND

FILED

AUG 14 1948

PAUL P. O'BRIEN,

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No. 11341

In the United States Circuit Court of Appeals

For the Ninth Circuit

TOM RUSTAD, Owner and Claimant of the Oil Screw "MELODY" and FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation,

Appellants,

vs.

CHARLES WUORI, JOHN KURTTI, CYRUS C. CHRISTENSEN and ARMAND SYVANEN,

Appellees.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

JURISDICTION

This was a libel in admiralty in the District Court. The appeal is from the decree there entered; consequently the jurisdiction of this Court is clear.

STATEMENT

The MELODY, a tuna fishing boat, capsized and was found by the libelants in their fishing boat, the

STAMPEDE II, "approximately" 9[1] miles off North Head, at the mouth of the Columbia River, on July 24, 1945. The MELODY was partially submerged, was heavily listing to starboard and only parts of her were visible above the water. Respondent Rustad was her owner, and he and the four men who, with himself, made up the crew, had taken to a rubber liferaft when she capsized, and had become separated from her by about a mile or two on account of wind and tide, but had not abandoned her, and had every intention of returning to her with the Coast Guard. The MELODY capsized at ten minutes to 1:00 P.M. (R. 205), and the STAMPEDE II came alongside about 2:30 P.M. (R. 55, 56). The weather was fine, the sea smooth. Libelant Wuori admits "There wasn't hardly any wind at all—very little wind. After 30 years of time I have been at sea I saw that much fine weather as there was. Seldom you see it, maybe once in 5 or 10 years, such nice weather as that particular weather when we found it first". R. 55. The tide was half ebb (R. 54) and there was an easy ground swell. (R. 55.) The STAMPEDE II nosed up to the MELODY and Syvanen, one of her crew, jumped aboard the MELODY and placed a line around her rud-

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(NOTE 1) The Findings of Fact, (R. 21), copying verbatim the words of the libel (R. 3) say she was "approximately" 9 miles north of the Columbia River and 9 miles West or offshore from the Washington Coast. This is admittedly only an approximation, and the testimony varies in regard to it. Libelant Wuori is particularly vague. At one place he says he was "perhaps six or seven miles offshore" when he sighted the MELODY, R. 52; and he must have been close to her then, for Syvanen who, with Kurtii, actually did the sighting (Wuori was then asleep, R. 125) said she was only a quarter of a mile away. R. 135. At another place Wuori says the MELODY was approximately 10 miles off North Head, R. 61; and so marked her on the Chart, Libelant's Ex. 1. Coast Guardsman Jensen said that when he arriverd at 5:15, R. 257, the MELODY and STAMPEDE were about 7 miles, 279 degrees true, off North Head. (This was after the STAMPEDE had been towing since 4 o'clock.) Coast Guardsman Shaw confirms this. R. 286.

der stock. He did this by getting into the open cockpit on the port side, and, without ducking his head under water, "jockeyed" the line around the rudder stock with his foot. R. 127-128. Wuori radioed the Coast Guard Stations ashore and they dispatched a lifeboat from the Cape Disappointment Station, another from the Point Adams Station, and the larger tug and lighthouse tender, TRIUMPH, which was coming in from another errand. *Prior* to the Coast Guard's receipt of that notice, however, some Navy patrol planes had spotted Rustad and his crew on the rubber life raft and had radiod that news to the Coast Guard Stations, and the "crash boat" from the Point Adams Station immediately put out to rescue the men. She left her station at 2:57 P.M., arrived at the lifeboat at 3:27, and picking up the men, went on to the STAMPEDE and MELODY, a mile or two away, arriving there at 3:40. R. 330. Seeing the situation there, the crash boat then radioed the Coast Guard Stations ashore to send out help to tow, and was informed that such help was already on the way in response to Wuori's radio. R. 331-332.

Rustad and a Coast Guardsman used the rubber life raft to transfer Syvanen from the MELODY back to the STAMPEDE II, and then, sensing that Wuori did not welcome his interference, and the crash boat being unequipped for towing, and the other boats from the Coast Guard being on their way out, Rustad and his men, in the crash boat, left for Astoria, passing the outcoming boats on the way in. The crash boat had remained in the vicinity of the MELODY and STAMPEDE about an hour. R. 330.

The Coast Guard lifeboat from Point Adams, responding "*immediately*" to the radio call of the STAMPEDE, had left that station at about 3:20. R. 257. Which shows that Wuori's radio was *subsequent* to that of the navy patrol planes by *nearly half an hour,* since the patrol planes radioed in at 2:56. R. 329. The Point Adams lifeboat arrived alongside the STAMPEDE at 5:15. R. 257. The Cape Disappointment lifeboat arrived at the scene about 15, and the TRIUMPH about 30 to 45, minutes later (R. 262), so that all three of these boats arrived within half to three-quarters of an hour of each other. R. 262. Shaw, Commander of the TRIUMPH, who kept notes, says she arrived at 5:50 P.M., which corresponds with the foregoing.

The Point Adams boat and the TRIUMPH, both without any difficulty, put lines aboard the MELODY. The Cape Disappointment boat stood by. Up to this time the STAMPEDE II had only succeeded in towing the MELODY less than two miles, and it had taken her nearly two hours. They were still in the open ocean.

We base the estimate of less than two miles on a composite of the following evidence: The time, which was less than two hours; the Finding that the MELODY was, at first, about 9 miles offshore, and the testimony of Jensen that when he arrived, she was about 7 miles off North Head, R. 258; confirmed by Shaw, R. 286; the fact that the STAMPEDE's tow-line had parted, necessitating delays, R. 261, 287; the fact that the MELODY was almost submerged, making a heavy tow, and that the STAMPEDE had only 100 horsepower; the testimony of Shaw that, with both Coast Guard boats tow-

ing, and aided part of the time by the STAMPEDE, and a flood tide, the speed was only about 2½ miles per hour, R. 308-309; and his testimony that when the STAMPEDE was towing alone, she made "very little progress," R. 307.

Of course after the Coast Guard boats took hold, the speed of the towing increased, and, as they entered the river, was aided by the tide flooding. All three towing boats were in front and spread out a little fanwise,—the TRIUMPH on the starboard, the STAMPEDE in the middle, and the Point Adams boat on the port side. As they entered the river, the STAMPEDE wanted to shorten her cable, and in doing so her propeller fouled the towline of the TRIUMPH. This was at 10:45 P.M. according to Shaw's notebook. R. 298. There is some dispute as to exactly how this occurred and whose fault it was. They then cut the TRIUMPH's line both in front of and behind the STAMPEDE, and leaving the cut segment in the STAMPEDE's propeller, fastened the two cut ends together and proceeded with the towing, the TRIUMPH and the Point Adams boat from that time on doing all the towing alone, and the STAMPEDE taking no part, but, on the contrary, being herself towed in by the Cape Disappointment Coast Guard boat. They arrived at the Point Adams Station at a half hour after midnight. R. 269, 308. The place where the STAMPEDE fouled the line was 700 or 800 yards, 120 degrees true, from No. 5A channel buoy, according to Jensen. R. 264. This is 7 miles from the Point Adams Station, as measured along the courses, on the Chart, Libelants' Ex. 2. So that the distance which the two Coast Guard

boats towed the MELODY entirely alone, without the STAMPEDE was 7 miles.

Arriving at the Point Adams Station, they beached the MELODY, and at low tide next morning, about 6 o'clock, the Coast Guard men, with their pump and equipment, pumped her out, the STAMPEDE crew standing by. R. 270-271, 283.

This completed the salvage. The Coast Guard, at Rustad's request, towed the MELODY to Astoria. R. 246, and Rustad himself disposed of his fish. R. 216.

The MELODY was towed to Portland for repairs. Her engines were found to be quite badly damaged by the sudden impact of the cold sea water against the hot metal. She cost, when new that spring, $20,000. R. 204. Her repairs and incidental expense cost $7527.24. R. 191-192. The difference between $20,000 and $7500 would make the net salved value $12,500, but this apparently would not have included tackle, bait tanks, paraphernalia and fishing gear, so the Court evidently added $5,000 for good measure. At any rate, he valued the boat, including all paraphernalia and gear, etc., at $17,500. R. 27. He arrived at a salvage award by estimating the total value of the services, *including* those of the Coast Guard, at $6,000 (R. 27), and apportioned two-thirds of that, or $4,000, to the libelants, and added $300 for loss of their equipment, so that the total amount of the salvage award was $4300. R. 29.

SPECIFICATION OF ASSIGNED ERRORS RELIED ON BY APPELLANTS

Appellants rely on Assignments of Error 1 to 10, inclusive, appearing at R. 32-34, and printed as an appendix to this brief. These Assignments are in essence that the services performed were not salvage of a high order, since they contributed little to the ultimate success and there was little danger either to the salved property or to the salvors; and, considering the value of the salved property, $17,500, the award was too high. Since the Assignments of Error all go to the foregoing alleged general error of the Trial Court, we ask that we may be permitted to discuss them generally under one head, instead of splitting the argument too much between them. We believe such course will benefit the Court.

ARGUMENT

The principles of salvage are, of course, well known. They are: (1) Danger to the property salved; in determining which nearness of other aid (Coast Guard) must be considered; (2) danger to the salvors and their property; (3) difficulties encountered and skill shown in overcoming them; (4) net value of the property salved.

We shall discuss these in their order:

Danger to the Property Salved

The MELODY was in no danger. She was in the open sea, far enough out to be in no danger of drifting ashore, and yet not so far but what she was within easy

reach of the Coast Guard's help. The weather was the finest. It was midsummer, with long hours of daylight. The breeze was gentle, the sea smooth, with an easy ground swell. It is true, she was capsized and more than half submerged. A strong play has been made by libelants to show that she was in immediate danger of sinking. This is extravagant. The danger is not proven by what they or anybody else may have *thought* at the time. The danger or lack of it is proven by the results. Now the plain facts are that she capsized at ten minutes to 1:00, lay awash in the sea until 4:00 P.M., or thereafter, when towing began, during which *three hours* she did not sink, and was then towed in to the Point Adams Station without any change in her condition, until she was finally beached at 12:30 A.M. the next morning. So that for a total of nearly *12 hours,*—from 12:50 P.M. to 12:30 A.M.,—she floated. If there is truth in the maxim that the "proof of the pudding is in the eating", we surely have it here. A claim was made by libelants that the mere towing of her helped to keep her afloat. This is against all the laws of physics, except on the aqua-plane principle. But it is obvious that this waterlogged boat, almost completely submerged, and being toward stern first, at perhaps one mile per hour, could not act on that principle. That she was not in any danger of sinking is, furthermore, attested by the only disinterested witnesses,—the men of the Coast Guard. Jensen said: "From the time you picked up the MELODY until the time you beached it were you at any time afraid the MELODY might sink? A. No; no, we were not. Q. Why weren't you? A. Well, being that she stayed afloat we knew there was no reason why she should

sink, unless we busted her up or something like that." R. 269. And Shaw, Commander of the TRIUMPH, in a colloquy with the Court, said: "The Court: What about the two hours before you got there, when he had hold of her alone? A. Well, he had hold of her alone but there was very little progress made. The Court: Might she not have sunk? A. You say she may have sunk? The Court: I didn't say that. I say, might she not have sunk? A. Well, she was afloat and it is my opinion that she would have stayed afloat for some time. The Court: For the two hours? A. Yes, sir." R. 307.

In considering her floatability, it must be remembered that the MELODY was a wooden hull, and that she had 5[2] tons of ice, oil tanks and airpockets, all tending to maintain her buoyancy. But the best proof is that in 12 hours' time she did not sink.

In considering what danger the salved property was in, the nearness of other aid is an important element, particularly the aid of the Coast Guard, whose special duty it is to act in these circumstances. The mouth of the Columbia River is well provided with an efficient Coast Guard service. Libelant Wuori has himself been towed in by them. R. 108. Stations are on both sides of the river,—one at Point Adams on the Oregon shore, and

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(NOTE 2) The Findings say 4. R. 22. There is not a shadow of evidence to support this, and it is only another instance of the Trial Judge's signing, without sufficient scrutiny, Findings prepared and placed before him by libellants' proctors. The only known FACT is that the MELODY on leaving Astoria had 6 tons of ice. R. 216. Rustad estimates that in the interval it had melted down to 5. R. 216. The only other estimate is Wuori's. After he had first said "I could not say," and after the most flagrant attempt of his proctor to put the word "four" in his mouth, he finally said that about "a thousand pounds" would have been used up. R. 77-79. This is ½ a ton. So according to Wuori, the remaining ice would have been 5½ tons; and according to Rustad 5. Yet the Findings, simply because libellants' proctor wrote them, say 4. It is perhaps not very important except to show the unreliability of the Findings.

one at Cape Disappointment on the Washington side. The MELODY, according to the Court's findings, was only 9 miles offshore. In short, she was within easy reach of these Coast Guard crews. A most important fact is that news that Rustad and his men were out there drifting on a life raft reached the Coast Guard *before Wuori's message*. We refer to the Navy patrol plane's radio to the Coast Guard Stations, which preceded Wuori's message by half an hour, and resulted in the crash boat going out. Of course when the crash boat got there and saw that it was not merely a human rescue, but that a towing job was also involved, they radiod in for boats equipped to tow, and the two lifeboats and the TRIUMPH arrived. So that libelants cannot even claim that, but for their radio message, help would not have arrived. The utmost that their radio message did was to start the towboats on their way out about one hour before they would otherwise have started.

Of course, once the Coast Guard boats were on the scene, they, with their better equipment, power and skill, did most of the towing.

Any analysis of the facts must convince the Court that if the STAMPEDE II had never appeared on the scene at all, the various towboats of the Coast Guard, in response to the crash boat's message, would have arrived on the scene at intervals between 6:00 and 7:00 P.M. in summer daylight, and would have towed the MELODY alone into safety. After their arrival the STAMPEDE contributed very little. In fact Shaw says that he, with the TRIUMPH, and Jensen, with the Point Adams boat, could have done just as well without her. R. 306.

How then can it be said that the MELODY was in any danger? Or that it was the STAMPEDE that saved her from danger?

We comment at this point on the Findings of "Fact". R. 20-28. These were prepared by libelants' counsel, and the Trial Judge, after a few minor changes and eliminations, signed them. The language is almost throughout, however, the language of libelants' counsel. These Findings of "Fact" contain many statements which are nothing more than conclusions, such, for example, as: "In this respect said vessel (MELODY) was kept afloat by the ice in her hold, airpockets within her hull and the fuel oil in her tanks, and upon the melting of said ice and the escaping of air from said pockets, and the loss of said oil from her fuel tanks, and the replacement thereof with water, said vessel would sink or likely to sink and become a total loss. So, at all times there was danger that said vessel MELODY might sink, and especially so if not kept under way." R. 24.

We do not need to point out to a Court of this experience that most of the foregoing is composed of mere conclusions. There was not the slightest evidence that the air did escape from the air pockets or any evidence at all that the oil did escape from the fuel tanks, and no reason at all to suppose that either the air or the oil would escape. And that the "vessel would sink or likely to sink and become a total loss" is obviously a mere conclusion. The same is true of the statement that "So, at all times there was danger that the said vessel MELODY might sink and especially so if not kept under way".

In respect to these matters, therefore, we are not faced with the rule that the Trial Judge's Findings of Fact on disputed evidence will not be disturbed unless clearly against the weight of it.

Danger to Salvors and Their Property

What danger was there to the STAMPEDE II or any of her crew in a calm sea on a summer afternoon? There were none of those skillful acts of seamanship which in many salvage operations approach the heroic. There was no shooting of rocket-lines aboard; no edging in close to a dangerous lee shore; no encountering of shoals, rocks or treacherous currents; no passing a line to the wreck by some heroic seaman swimming to it through dangerous waters; no storm; no breakers; no danger of collision caused by heavy seas. No. All that happened was that the STAMPEDE II put her bow up against the MELODY and Syvanen jumped aboard the MELODY and tied a line around her rudder stock. An effort by libelants was made to show that in doing this Syvanen might have got entangled in some lines and been carried down if the MELODY had suddenly sunk. The testimony about the lines is suspicious, (Rustad says they were all secured, R. 248) but, granting its truth, there is no reason why a man, working without haste, in calm weather, should get entangled in them; and most certainly there was no danger of the MELODY taking any sudden plunge to the bottom. She was simply a water-logged vessel easily drifting, and if she had sunk at all, would have sunk gradually.

The same may be said about the claim that the STAMPEDE might have had her propeller fouled in lines that were hanging from the wreck. It certainly would have been most unskillful seamanship, even conceding the lines were there. Nosing her bow up against the wreck, her propeller would have been 50 feet away. And even if fouled, it is an easy job in a calm sea, in daylight, to put a man overboard to free it. And besides the Coast Guard was within call.

To say more on this would tax the Court's patience. There was no danger to Syvanen, or to the other libelants, or to the STAMPEDE II herself.

In fact the libelants concede that after they had made their line fast and started towing, there was no risk at all as long as they were outside in the open ocean. R. 101. But they contend that after they got near the jetties (this was after the Point Adams boat and the TRIUMPH had joined the tow), there was some danger of being set northward toward Peacock Spit. There was no such danger at all. The river's mouth for vessels of this draft is more than a mile wide. The tide was beginning to flood, at which time there is no current toward Peacock Spit.

The merits of a salvage claim depend in part on the skill shown by the salvors. The unskillfulness of these salvors is shown by the circumstances which surrounded the fouling of the TRIUMPH's line by the STAMPEDE II. This happened at 10:45 P.M., according to the notation in Shaw's book (R. 298), when the boats were at or inside the river entrance. R. 264, 89, 146. The three boats towing slightly fanwise were in this position: The

STAMPEDE II was in the middle. The TRIUMPH was on the starboard side, and the Point Adams boat in the same relative position on the port side. The STAMPEDE II, which had out a hundred fathoms of line, desired to shorten it. According to Wuori, this was because they were entering the channel, but according to the Coast Guard men, it was because his line was fouled on the bottom. Anyway, without any clear understanding, R. 289, with the two Coast Guard boats on either side of him, he reeled in his line, and in so doing, in spite of the TRIUMPH'S efforts to veer off and keep out of the way, he went over the TRIUMPH's line and fouled it in his propeller. From that time he was helpless. They cut him loose and the Cape Disappointment boat towed him into Point Adams while the other two boats brought in the MELODY. Does this sound like a skillful operation? One may well wonder how such blundering could have happened. The explanation, however, is found in libelant's own testimony. *Nobody remained at the STAMPEDE's wheel.* Part of her crew were *asleep and Wuori was trying to handle the boat alone.* We refer to this testimony of Wuori himself:—"So then we started to shortening our towlines. The TRIUMPH went from starboard to port. We were still going ahead continuously running. Q. Where were you at the time? Were you in the pilothouse? A. I was in the pilot house. Q. Were you at the wheel? A. I can't remember where I was. Yes, I was on the wheel. *I was alone there* at the time when I made the telephone call. *The boys were asleep.*" R. 71-72. And also this testimony: "Q. Was it your purpose to slow down just sufficient, to a speed sufficient to reel this line in without any particular pull

on it? A. Yes. Q. Was that the purpose? A. Yes. Q. All right. Now where were you at the time? A. I was at the wheel. Q. Who was at the winches, if anybody? A. John Kurtti was at the winches, and *then once in a while I came out on the main deck, too. There wasn't anybody on the wheel at the times,* but I got mechanical steering apparatus." R. 84. He then explains that with such apparatus you can set the vessel on a course and it will stay there.

Here we have the plainest evidence that in a maneuver admittedly requiring skillful seamanship,—i. e., taking in a towline at night in a river channel with two other towboats, one on each side,—Wuori attempted to do it without reaching a clear understanding with his companion towboats, and with half his crew asleep and only himself at the wheel, which he had to leave from time to time to superintend the reeling in of the line. If that was skill, entitling the salvor to a meritorious award, or to be paid for a cable which he lost as a consequence, then all we can say is that we are badly mistaken in the law.

On this subject of dangers encountered by salvors, we shall say no more, except that the whole operation was merely one of towage involving no more than the slight hazard which may be said to inhere in any towage operation. Certainly there was no risk in making fast to the MELODY, nor in towing her in the open sea, in calm weather, with Coast Guard boats alongside. And it would be a timid seaman, indeed, who would say that he would fear to enter the Columbia River's mouth, more than a mile wide, on a calm night, on a flood tide

floating him in.

The exaggerated claims of "danger" and "hazard" (often, by the way, put into the witnesses' mouths by leading questions), are on a par with their extravagant claims about the fishing they lost. Of course they could have gone on about their fishing as soon as the Coast Guard arrived, but they claim they lost "just about a week" (R. 118), or "a little better than one trip" (R. 119), and that the average "gross" value of one trip is "between $2000 or $3000" R. 119. What the "net" might be we do not know. The mystery of how the STAMPEDE, which suffered no damage at all, and was merely put on the beach next morning and freed of the line in her propeller, R. 75, could lose a week instead of proceeding at once to sea, is not satisfactorily explained. A weak attempt is made at R. 124, where Wuori claimed that it took "almost a week" to refuel and re-equip. This is not credible. A more satisfactory explanation is that Wuori, eager for the "insurance", spent that week with his attorney, Mr. Fulton. The libel was verified August 4th, R. 12, only ten days after these events. Obviously what fish the STAMPEDE might, or might not, have caught is purely speculative. The vagueness of all this and the willingness of the Trial Judge to sign whatever Findings of Fact libellants placed before him, on matters which he evidently regarded as not very important, are illustrated by the fact that although the libel itself, exaggerated as it was, only claimed for the loss of fishing "the sum of $2000 to $3000" (R. 10), and although libellant's testimony claimed no more, R. 119, the Findings of Fact say that libellants "lost a trip and

a half of bottom fishing, at a loss to them of from $3000 to $5000" (R. 27). This is evidently based on some later testimony of Wuori's at R. 198. Of course it is all a mere guess, and a conclusion. And why "a little better than one trip", which was Wuori's testimony at R. 119, was stretched to "a trip and a half" at R. 198, we do not know.

These matters are not important except as showing that extravagance which characterizes all of libellants' claims and the willingness of the Trial Judge to accept libellants' Findings of Fact without any close scrutiny.

THE AWARD

The Court, valuing the salved property at $17,500; allowed libellants $300 for expenses; and in addition made a total salvage award, *including the services of the Coast Guard,* of $6000. This is *34.2%* of the net salved value; and in view of the nature of the services, and of the authorities which we shall submit in this brief, is high. Even for saving abandoned derelicts after heroic and dangerous efforts, the award is seldom more than 50%. So that $6000 seems to us excessive. But certainly to award $4000 of this to the libellants is to greatly overrate their services and to underrate those of the Coast Guard. Of course the Coast Guard, since they were merely performing their duty, got nothing, and the Court used the $6000 only as a method of arriving at a segregated portion thereof for libellants. But that portion, amounting to 2/3, is all out of proportion. It elevates the services of Wuori et al., and deprecates those of the

Coast Guard.

An analysis of these combined services shows that the total distance towed, from the point where the STAMPEDE first took hold to the Point Adams Station where the MELODY was beached, is about 20 miles, according to Wuori's testimony and his marks on the charts, and about 18½ miles according to our estimates, based on the Record generally. At all events the discrepancy is not great. These distances are measured along the courses the boats followed, as marked on the charts. If we accept the distance of 20 miles, as testified by Wuori, and as more favorable to him, an examination of the charts (Libelant's Exhibits 1 and 2) will show that from the X on Exhibit 1, which Wuori indicated as the original position of the MELODY, to the X, inside circle, marked by Jensen, as the position when he came up, and confirmed by Shaw R. 286, the distance is 3½ miles. This, though somewhat greater, we believe, than the actual fact, is the maximum distance the STAMPEDE towed alone. From this point to the "North Whistler" buoy, measured on the chart, is 6½ miles. This distance the 3 boats towed together. From here, rounding the buoy and proceeding into the river, they continued towing together to the place where the STAMPEDE fouled the TRIUMPH's line. This distance is a little less than 3 miles, according to the mark placed on Libelant's Exhibit 2 by Jensen, but a little farther, according to Wuori's mark. We accept Jensen's as the more accurate, and because it closely corresponds with the allegation in Wuori's own libel that the fouling occurred "at a point on the main channel range of the Columbia River, approxi-

mately abreast of the West end of both North and South Jetties." R. 25. The total distance thus towed by the 3 boats together was, therefore, 6½ plus 3, or 9½ miles. From this point, where the propeller fouled, to the Point Adams Station is 7 miles, measured along the channel course. This 7 miles the two Coast Guard boats towed alone; the STAMPEDE, helpless, being towed in by the Cape Disappointment boat.

It is quite obvious that on the basis of distance covered, the Coast Guard boats did most of the work. When we add the additional factor that they had more power than the STAMPEDE, the discrepancy becomes even greater.

Based upon the foregoing accurately measured distances, the respective services may, in fact, be proportioned with arithmetical precision thus:—

The STAMPEDE had 100 horsepower. Libel R. 7.
The Point Adams boat had 75 horsepower. R. 257[3].
The TRIUMPH had 160 horsepower. Libel R. 7 and R. 286.
The total horsepower employed was, therefore, 335.
Of this the STAMPEDE furnished 100/335ths.
The total distance towed was 20 miles.

For the purpose of this computation we accept, as most favorable to libelants, a total distance towed of 20 miles, though, as a matter of fact, we think it was, at most, not over 18½.

Likewise, for the purpose of this computation, we

(NOTE 3) The libel says 100 horsepower. R. 7. If we accepted this figure it would be 25 horsepower to our advantage. But Jensen, Commander of the boat, says 75 horsepower, and as he should know, we give libelants the benefit of any doubt, and take the lower figure.

shall credit the STAMPEDE, as most favorable to her, with the first 3½ miles. In doing so, we give her the benefit of the doubt because, for the reasons already stated on Pages 4-5 of this Brief, we think 2 miles would be a very liberal allowance for her. But say, 3½ miles. The next 6½ miles the 3 boats towed together to the North Whistler buoy, and, rounding it, continued to tow together for not quite another 3 miles,—but say, 3 miles, making a total of 9½ miles, all 3 boats towing, to which mileage the STAMPEDE contributed 100/335ths of the horsepower. The contribution to this mileage was, therefore, 100/335ths of 9½ miles, which is 2.835 miles. There the STAMPEDE's services ended. Of the total 20 miles covered, therefore, she should be credited with only 3½ miles plus 2.835 miles or 6.335 miles. 6.335 miles is her portion of the 20. 6.335/20ths of the total award of $6,000 should, therefore, be her portion of the award. 6.335/20ths of $6000 is $1900.50. Yet the Court gave her $4,000. How can that be justified? Even $1900.50 would be too much because, as stated already, $6,000 is too much.

In the foregoing analysis the first 3½ miles have been credited to the STAMPEDE. We think it is too much. We believe 2 miles, for reasons already stated, would be generous. On this basis, and estimating the total distance covered at 18½ miles, and applying the principles above, the award to the STAMPEDE would be $1568.10.

Your Honors will observe that in the foregoing analysis we have credited nothing to the crash boat, and nothing at all to the Cape Disappointment boat, al-

though in fairness something should be credited to the latter because she stood by all the way in, and eventually towed the helpless STAMPEDE the last 7 miles. But since we have made the computation only on the basis of miles which the MELODY was actually *towed*, we have left the Cape Disappointment boat out.

Substantially the same result will be reached if we compute the services on the basis of time, that is to say, on the basis of horsepower hours consumed. And in this computation we shall include, this time, the Cape Disappointment boat, because her time was actually given along with the other Coast Guard boats, and she actually performed the standby services and the eventual towing in of the STAMPEDE.

Computed on the basis of time, the services were as follows:—

The STAMPEDE sighted the MELODY at 2:30 P. M. R. 3, 21, 55-56. She reached Point Adams, along with the other boats, at 12:30 A.M. R. 269, 308. This was 10 hours' time.

The Point Adams boat left its station at 3:20 P.M. R. 257. The Cape Disappointment boat must have left her station at the same time because both were responding to the same radio message. The same is true of the TRIUMPH. She was on her way into the river from Tillamook Rock, and, receiving the message, instead of going in, went on to the MELODY. Therefore all these 3 Coast Guard boats began their services at about 3:20 P.M. For the sake of easy calculation, we put it 10 minutes later, and say that they did not begin their services

until 3:30 P.M. From 3:30 P.M. until 12:30 A.M., when all landed at Point Adams, is a period of 9 hours.

To sum up the foregoing, therefore, the STAMPEDE put in 10[4] hours' time; the 3 Coast Guard boats put in 9 hours' time.

The horsepower hours are calculated as follows:

For the STAMPEDE—100 × 10, or 1,000 horsepower hours;
For the TRIUMPH—160 × 9, or 1440 horsepower hours;
For the Point Adams boat, 75 × 9, or 675 horsepower hours;
For the Cape Disappointment boat, 75 × 9, or 675 horsepower hours.[5]

The total horsepower hours consumed, therefore, are 3790; of which 1,000 were consumed by the STAMPEDE and 2790 by the 3 Coast Guard boats.

1000/3790ths, therefore, should be the portion of the total award attributed on a time-basis to the STAMPEDE. Applying this rule, 1000/3790ths of $6,000 is $1,583.11. This is surprisingly close to the $1,568.10 computed on a distance basis, supra, page 20.

Again we ask, how on any basis whatever can an award of $4,000 to the STAMPEDE II be justified?

We have before adverted to the fact that little value can be given to Wuori's radio message to the Coast Guard. For the radio from the Navy planes had pre-

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(NOTE 4) This is generous, for it includes the period from 10:45 P.M. to 12:30 A.M.,—1¾ hours—when the STAMPEDE did *nothing*, but, on the contrary, was herself being towed. Strictly she should receive no credit for this time, for her services had ended.

(NOTE 5) The Cape Disappointment boat and the Point Adams boat were the same, both 36 foot life boats. R. 257, 274.

ceded it.

And as for the STAMPEDE's alleged "services" in "standing by" after she fouled her wheel, she was, as a matter of fact, helpless (R. 291) and had herself to be towed in by the Cape Disappointment boat. R. 291. And why should there be any necessity of her "standing by" at all? When the Cape Disappointment boat was alongside with nothing to do but to perform that very standby service? "Ridiculous" is not too strong a word for these claims.

In conclusion, we say that on no basis whatever can an award of $4,000 to the STAMPEDE be justified. Based on a total award of $6,000, used as a measuring stick, it is all out of proportion, as we have shown, to the services performed. And the $6,000 is itself too high, since it is 34.2% of the salved value for services which were only a little more than mere towage.

AUTHORITIES

Unwarranted and extravagant demands of salvors, eager as these were from the start, "to build a case of salvage", will mitigate and sometimes even deprive them of an award. The PEJEPSCOT—JOHN AND FREDERICK, 1939 A.M.C. 316, 322; LEWIS BROTHERS, 287 Fed. 143, 145.

A salved vessel is not responsible for damage to salving vessel caused by fault of latter. (Hence, respondent here not liable for value of cable lost by Wuori if it was through his fault. THE JEAN SOMERVILLE, 1923 A.

M.C. 142; 286 F. 35.

Following are examples, mostly of fish boats, which approximate this case:

THE QUODDY, 123 A.M.C. 997; 289 F. 132.

Disabled fish boat towed in in 10 hours in fair weather. Total salved value $4,434. Salvage "of a rather low order". Award $175.

THE LEWIS BROTHERS, 1923 A.M.C. 998; 287 F. 143.

Schooner worth $8000, with deckload of lumber worth $14,000. Heavy weather. Deckload shifted. Small leak. Captain killed. Salvor worth $1,000,000. Towed schooner 95 miles in 14 hours. In so doing lost 10 hours. Award $500 to owners of steamer. No award to crew. no award to steamer's mate, who boarded schooner, because he grossly exaggerated his services.

THE TRUXILLO, 1926 A.M.C. 172.

Worth $59,000. Was towed 10½ hours to place of safety. Weather gentle to moderate breeze with heavy swell. Value of salvor $230,000. Salvor claimed loss of 24 hours due to navigating river at night and loss of stevedoring service through delayed berthing. Services of a "low order". Double towing rate allowed. Total award $2840.

THE PARISMINA, 1926 A.M.C. 673.

The PARISMINA was broken down and drifting helplessly. Salvor towed her 180 miles into Havana. Each vessel worth $300,000. Salvage of "very low order". Award $200 per hour for towing; $100 per hour for loss of time.

THE MARY PIGEON, 1927 A.M.C. 634; 17 F. (2d) 921 (CCA, 9th Circuit).

The MARY PIGEON, a fishing boat, had engine room flooded and engines out of commission, but was not helpless, as she could have, if weather held, used her sails to reach port. Accepted assistance of the INVINCIBLE, another fishing boat, which towed her 3½ hours for 12 miles to safety, and on the next day a further 50 miles to Turtle Bay, in 8 hours' time. Trial Judge awarded $1700 for first towage, holding it to be salvage; $80 for second towage, holding it to be mere towage. Conclusion of CCA was: "We think the salvage award should be reduced to $500, and that the sum payable by appellant on final decree accordingly be reduced to $278.80."

The reasons for this reduction were the gross exaggeration and the false claims of the salvors, in which respect we suggest the present case is analogous.

THE MARITIMA, 1929 A.M.C. 355.

The MARITIMA, a fishing boat with a fresh catch of fish aboard, broke main crank shaft and was helpless, except she could steady herself with her sails, but could make no steerageway. She was worth $20,000. Two trawlers, worth, respectively, $10,000 and $14,000, towed her from 6:00 P.M. one day until following morning, a distance of 40 miles. Wind blew 25 to 35 miles per hour that evening, and no other boats in the immediate vicinity. Sea was rough and some danger. A towboat would have charged $150 to go from Boston to the MARITIMA's position and tow her back. Judge Lowell said: "It seems to me, gentlemen, that there was a low degree of salvage performed in this case. On the other

hand, even double towage seems to me a little low. I should say that a fair figure was $500, to be awarded equally to the masters and crews of the two vessels."

THE ISABEL Q., 1929 A.M.C. 489.

THE ISABEL Q., a fishing schooner, was broken down. Another schooner towed her 36 miles in 5 to 6 hours. Weather moderate. No cargo on board either schooner. Salvor was delayed in her fishing about 10 hours. Salvor worth $20,000, salvee $17,500. Salvee offered $500. Lowell, District Judge, said: "This was a mere plain case of towage. There was not the slightest element of salvage in it. I think they were very foolish not to accept the offer. I award them $300."

AUDREY-STAR, 1931 A.M.C. 1698.

The STAR, a fishing boat, worth $7,000, was stranded on reef and in considerable danger. The AUDREY, after a number of attempts, pulled her off. "The service rendered was a salvage service though not of a high order". Award $500 to owners and $125 to crew. Total $625.

COMMONWEALTH, 1932 A.M.C. 199.

The COMMONWEALTH, a wooden fishing boat worth $12,000, stranded on Alaskan reef. EL HURD took off her crew and all loose gear. Returned next day and pulled wreck off reef and towed it to shore, but COMMONWEALTH dragged her anchors and stranded on a safe beach, from which EL HURD again pulled her afloat. HURD worth $7,000. Awards by Judge Neterer were $1200 to owner of HURD, $300 to master.

ROBIN—SERRA, 1932 A.M.C. 1476.

SERRA, a wooden fishing boat, broke rudder off Farallones. ROBIN, another fishing boat, which abandoned large school of fish just located, came to her assistance. SERRA had no wireless or means of signals and ROBIN was only boat in vicinity. ROBIN towed SERRA to Oakland, 31 miles, in 5 to 6 hours, encountering some difficulties on way. SERRA in no immediate danger, but if not picked up her situation would have become serious. Value of SERRA $24,400; value of ROBIN $18,800. Award by Middleton, arbitrator, $1100, including damages ROBIN sustained and loss of fish.

BELLE ISLE—PATRIA—SAN SALVADORE, 1934 A.M.C. 147.

All three were tuna fishing boats. Salvor, BELLE ISLE, rendered slight services to other two and lost "greater part of a day's fishing". Claimed $10,000 award against each boat. Salvees offered $150 and $200, respectively. Commissioner awarded these latter amounts and was confirmed by Court.

JAPONICA, 1935 A.M.C. 480.

Ten percent, or $400, was awarded for towing a large motor passenger boat worth $4,000, with engine bearings burned out, for 12 hours to a place of safety, and then notifying the Coast Guard who completed the salvage. The salvor was a small motor boat worth $400.

PEJEPSCOT—JOHN AND FREDERICK, 1939 A.M.C. 316.

This case already cited above. The tug PEJEPSCOT and tow, together worth $40,000, stranded. Two small

tugs assisted in pulling them off. No particular danger. Coast Guard was at hand. Total award to one tug $832.50, and to the other $806.25.

NORTH STAR—FRIGIDLAND, 1940 A.M.C. 1017.

This case resembles the present. Both were fishing vessels. The FRIGIDLAND, salvee, was capsized. Worth $26,000; net salved value $15,000. Salvor worth $40,000. Services were: responding to salvee's call for help, sending radio message to Coast Guard, putting line aboard salvee and standing by for 5 or 6 hours keeping spotlight on her until Coast Guard arrived, and then taking crew into San Francisco. Award by arbitrator, E. E. Williams, $100 for "slight" salvage services, and $101.86 loss of fishing, based on average catch of other boats same night, total $201.86.

FORM OF DECREE IS WRONG—ASSIGNMENT OF ERROR X

The decree is against the MELODY and respondent Rustad "*and his stipulator Fidelity and Deposit Company of Maryland*", and decrees recovery from them of $4300 and directs "that execution issue therefor". R. 29, 30.

It is erroneous and against well-established admiralty practice to issue a decree against the stipulator in this form. The stipulator's stipulation is "conditioned that the claimant above named shall abide by and pay the money awarded by the final decree", etc. R. 14. This is the usual form. No decree should ever issue against a stipulator until the claimant has first been given a chance to "abide by and pay the money awarded by the final decree". It is not until the claimant fails in that obligation that the stipulator is called upon to do anything. Of course the stipulator's stipulation has nothing whatever to do with the suit in personam against Rustad; it has only to do with the suit in rem against the MELODY. The usual form in such a case is for the decree to run in the first instance against the claimant only, and then to provide that a certain time shall be given to the stipulator to "perform the engagements of his stipulation". If he does not do so, then a supplementary decree issues against him. But it is wrong, as was done in this case, to make the decree run against the stipulator in the first instance. The error was pointed out to the Trial Court but he disregarded it.

CONCLUSION

We ask that this Court weigh the reasons advanced in this brief for reducing the amount of the award, and then order that a decree be entered in proper form for such amount as to this Court seems just.

Respectfully submitted,

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APPENDIX

ASSIGNMENTS OF ERROR

The trial court erred in the following particulars:

I.

In holding in effect, that the appellees rendered salvage services of a high order, entitling them to the awards made in the decree, instead of holding that the services were in the nature of towage, or at most salvage of a low order.

II.

In holding, in effect, that the Melody was in serious danger and might sink, and that "but for the assistance so rendered by the libelants," she was likely "to have been entirely and wholly lost." This holding is especially erroneous because it ignores the presence of the Coast Guard, which was on the scene almost from the beginning, and in fact performed most of the towing.

III.

In holding that the appellees incurred danger to their persons and property; and in not holding that, on the contrary, there were no unusual risks occurred at all; nothing beyond an ordinary towing operation. [27]

IV.

In holding that appellee Syvanen boarded the Melody "at risk of his life and person."

V.

In holding that the Stampede II, after she fouled her wheel in the Triumph's line, stood by, and was ready

and able to perform further services if needed; and in not holding that, on the contrary, she was, from this time on, disabled, and useless, and had to be towed in herself by the Coast Guard.

VI.

In holding that the value of the Melody, prior to the service, was $25,000, and after it, $17,000.

VII.

In holding that appellees lost $3000 to $5000 worth of fishing.

VIII.

In holding that the services rendered by appellees and the Coast Guard were, together, worth $6000, and in apportioning two-thirds of this to appellees.

IX.

In entering its decree awarding $4300 to appellees, apportioned as in said decree.

X.

In summarily including in said decree the stipulator Fidelity & Deposit Company of Maryland, without first giving it, in accord with admiralty practice, an opportunity to perform the engagement of its stipulation.

CORRECTIONS IN APOSTLES

We notice the following rather obvious errors in the Apostles:

On page 108, lines 17 and 25 the word "selfish" should be "salvage".

On page 262, line 20, the word "make" should be "take".

On page 293, line 21, the word "school" should be "spool".

On page 307, line 8, the word "we" should be "he".

On page 331, line 13, the word "station" should be "situation".

No. 11341

In the United States

Circuit Court of Appeals

For the Ninth Circuit

TOM RUSTAD, Owner and Claimant of the Oil Screw "MELODY" and FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation,

Appellants,

vs.

CHARLES WUORI, JOHN KURTTI, CYRUS C. CHRISTENSEN and ARMAND SYVANEN,

Appellees.

BRIEF ON BEHALF OF APPELLEES

Upon Appeal from the District Court of the United States for the District of Oregon.

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FILED

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Appellees.

BRIEF ON BEHALF OF APPELLEES

Upon Appeal from the District Court of the United States for the District of Oregon.

The proceedings herein are a libel in admiralty brought in the District Court of Oregon. It is the contention of the appellees that this court is without jurisdiction to review this matter on appeal for the reason that appellants did not comply with subdivision (b) of Rule 73 of the Rules of Civil Procedure.

POINTS AND AUTHORITIES

I.

MOTION TO DISMISS APPEAL

Rule 73, of the Rules of Civil Procedure, subdivision (b), reads in part as follows:

> The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and **shall name the court to which the appeal is taken.**

II.

FRIVOLOUS APPEAL

> An appellate court in reviewing the amount of a salvage award, the fixing of which involves the exercise of discretion by the lower court, is always reluctant to make any alteration thereof; it will not interfere with the decision of the court below as to the amount of salvage awarded unless the judgment has proceeded upon an erroneous principle or a misapprehension of the facts, or is grossly or manifestly excessive or inadequate. The fact that the appellate court might have allowed a greater or less sum if the question had first been presented to that court is no ground for increasing or reducing the award. In accordance with these principles, the award fixed upon by the lower court will not be increased on the ground that it is inadequate. The same rule is applicable in diminishing the amount fixed upon by the lower court, and the amount so fixed will not ordinarily be diminished unless it can be said to be excessive as a matter of law.

47 A. Jur., Salvage, Sec. 46, pg. 289.

III.

GOVERNMENT ASSISTANCE

Where a government vessel and others co-operate

in a salvage service, the proper method of making an award to the latter is to fix the value of the entire service and deduct the share earned by the government ship.

Central Wharf Towboat Co., et al. v. United States, (The Anahuag), 295 Fed. 246.
United States v. Central Wharf Towboat Co., 3 Fed. (2d), 250.
47 Am. Jur., Salvage, Sec. 26, pg. 277.

IV.

RULES OF SALVAGE AWARD

Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for a salvage service: (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued.

The Ship Blackwall, her tackle, etc., James Creary, Claimant, vs. The Sancelito Water and Steam Tug Company and George Clark, 19 L. ed., pp. 870-875.
47 Am. Jur., Salvage, Sec. 33, pg. 281.
47 Am. Jur., Salvage, Sec. 6, pg. 265.

V.

EFFECT OF ASSISTANCE

If part of a salvage service is performed by one set of salvors, and the salvage is afterward completed by others, the first set is entitled to a reward pro tanto for the services they actually rendered even though the part they took, standing by itself, would not in fact have effected the salvage.

47 Am. Jur., Salvage, Sec. 26, pg. 277.

VI.

DERELICT

Derelict vessels and other property constitute subjects of salvage. A vessel or cargo is derelict within the rules of the maritime law relating to salvage when it is abandoned without hope of recovery and without intention of returning to it. It is immaterial whether the abandonment arises from accident, necessity, or voluntary dereliction.

47 Am. Jur., Salvage, Sec. 4, pg. 263.

VII.

QUASI DERELICT

In salvage proceedings where the circumstances do not constitute the vessel in question a derelict, but are of such a nature as to render the services performed in saving it highly meritorious, the courts have sometimes applied the term "quasi derelict" to the

vessel. Thus, the term has been applied to a vessel in a desperate condition, where the persons on board were incapable, by reason of their mental and physical condition, of doing anything for their own safety. So, also, it has been held applicable to a vessel left by its master and crew when thought to be sinking, where the master had gone immediately for assistance, and the vessel was finally brought to port.

47 Am. Jur., Salvage, Sec. 5, pg. 264.

VIII.

INJURY TO SALVING VESSEL

It is settled that a salvage award should include damages suffered by the salving vessel due to the necessities of the service.

47 Am. Jur., Salvage, Sec. 36, pg. 283.

IX.

THE AWARD FOR SALVAGE SERVICES

Salvage is not viewed by the admiralty courts merely as pay on the principle of a quantum meruit, but as a reward given for perilous services voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.

The Blackwall v. Sancelito Water & Steam Tug Co., (The Blackwall), 10 Wall 1, 19 L. ed. 870.
47 Am. Jur. Salvage, Sec. 31, pg. 280.

X.

AMOUNT OF AWARD FOR SALVAGE SERVICES

The question of the amount of the salvage award is always a difficult one. It is largely a matter of fact and discretion which cannot be reduced to precise rules, but depends upon a consideration of all the circumstances of each case. No rule of law can be laid down that a certain percentage of the property saved should go as salvage in every case; generally, when a proportion of the thing saved has been awarded, a half has been the maximum, and an eighth the minimum. Below that it is usual to adjudge a specified sum or amount of money.

47 Am. Jur., Salvage, Sec. 32, pg. 280.

XI.

APPORTIONMENT

The salvage awarded is apportioned among the owners, the master, and the crew, the owners of the ship recovering a substantial portion, usually from one fourth to one half of the entire amount, in order to encourage them to permit their master to render such services. To the master should be allotted from one-eighth to one third, for the master is a person who ought to be generally encouraged because upon him rests the whole responsibility of employing the ship. The balance should be awarded to the crew of the salv-

ing ship.

47 Am. Jur., Salvage, Sec. 38, pg. 285.

STATEMENT OF FACTS

The Oil Screw or Vessell "MELODY" and its equipment and cargo are valued from $25,400.00 to $39,000.00. The Lower Court found the value less the value of the fish to be $17,500.00. That said vessel, at about the hour of 1:00 o'clock P. M. on the 24th day of July, A. D. 1945, in the Pacific Ocean, on a fine sunny day, in a mild wind and sea, was engaged in a tuna fishing venture when suddenly and without any warning whatever was thrown on her beams end and immediately filled with water. That said vessel immediately submerged to a point where only a part of her pilot house, bait tanks, mast and a small part (about 6 square feet) of her aft deck were above water, The captain and some members of her crew fearing that the Melody would sink and they be drowned forthwith leaped into the sea. R. 221. A life raft was loosened from the Melody and all five members of the crew proceeded to board it. The raft was not made fast to the Melody, or any attempt made to do so. What happened to the crew after that or their intentions in abandoning the Melody, we have but the captain's word for it. We did not have the benefit of any testimony of any other members of the Melody's crew. The

captain stated the wind blew the life raft away from the Melody, the wind being about 5 or 6 miles per hour. Thereupon, according to the captain of the Melody, the raft was rowed towards the shore for the purpose of landing through the breakers and seeking help. In the meantime, Captain Wuori and the members of the crew aboard the Oil Screw or Vessel "Stampede II," a deep-sea fishing vessel, of the value of $35,000.00, sighted the derelict vessel "Melody," and at about 3:00 o'clock P. M. arrived alongside the said Melody and discovered there were no persons visible aboard said vessel. The Stampede II proceeded to make two circles about the sinking Melody seeking for the crew, which libelants expected to find in life preservers, if any were found. In the meantime, Captain Wuori notified the United States Coast Guard at its station at the Port of Astoria, Oregon, of the facts and requested that immediate search be made for the Melody's crew and assistance for the purpose of attempting to save the Melody, her equipment and cargo. When no survivor could be found, libelant Armand Syvanen, a member of the crew of the Stampede II, at the risk of his life and injury to his person, R. 126-277-263-56-159-100-102 boarded the Melody and made fast a line from the Stampede II to the Melody. At this time, a government crash boat arrived on the scene with the crew of the Melody, and were requested to make fast

a line to the Melody and assist with the tow. R. 59. This request was refused, the officer in charge of the crash boat stating that the crash boat was not equipped to tow. Therefore, they were requested to place some chaffing gear on the Manila rope which was placed around the rudder stock by libelant Syvanen, and return Syvanen to the Stampede II. Thereupon, Captain Rustad of the Melody and one member of the crew of the crash boat proceeded to remove said Syvanen from the Melody to the Stampede II, but refused to place any chaffing gear on the Manila line as requested, or in any way assist with the salvaging of the Melody. That approximately at 3:00 o'clock P. M., the Melody went under tow of the Stampede II.

At approximately 6:00 o'clock P. M. of said day, a United States Coast Guard open surf boat and the 52 foot United States Coast Guard "TRIUMPH," made fast lines to the Melody and assisted in the tow, the Stampede II being in the lead about 100 or 150 feet, followed by the two Coast Guard vessels, following equal distant, and being 75 to 100 feet respectively off the port or starboard beam of the "Stampede II." When the Stampede II first started to tow and salvage the Melody, her equipment and cargo, their position was from 7 to 10 miles Northwest of the North Jetty of the Columbia River, a distance of 14 to 17 miles from the United States Coast Guard Station of

the Port of Astoria, Oregon, the place where the Melody was beached at about 1:30 o'clock A. M. on July 25, 1945, and the water removed from her holds. When the tow was started, the tide was about one-half ebb. R. 62. This was an important factor in the salvaging operation, for it was all important to get the Melody into a safe haven during the coming flood tide, R. 54, which started at 8:04 o'clock P. M. on July 24, 1945, and ended at 1:55 o'clock A. M. on July 25, 1945. Current tables Pacific Coast for 1945, published by U. S. Dep. of Commerce page 95. That on account of the bar, tide, current sets and shoals, the waters in the vicinity are historically dangerous and have claimed many vessels and hundreds of lives. R. 89-195. The tow proceeded satisfactorily until the tow reached a position in the main ships' channel off the Columbia River, which was about on a line drawn from the West ends of both the North and South Jetties of the Columbia River. This area is dangerous to vessels and crews. The tide was flooding strong when Captain Wuori, at about 11:00 o'clock P. M., whose vessel was in the lead, suggested that they shorten their lines so that better control be had of the tow since they were entering more congested waters, particularly a mine field. Thereupon, the Stampede II entered upon shortening its line and while so doing, its propeller became fouled with the tow line of the triumph. Thereupon, the

Stampede II cut loose its tow line which was lost, and cut the tow line of the triumph between it and the Stampede II, and then cut said tow line between the Stampede II and the Melody, and delivered it to the triumph, which made it fast and continued with the tow. Captain Wuori then freed the propeller, and, in the meantime, as a matter of prudence and good seamanship, requested a tow from a third Coast Guard vessel, an open surf boat, which was accompanying the tow. The Stampede II was not incapacitated, and Charles Wuori intended to resume the tow, if it became necessary, which later investigation showed could have been done efficiently and without damage to the Stampede II. R. 73. Thereupon, the Stampede II and said third United States Coast Guard vessel stood by the Melody, her equipment and cargo, until all danger was passed. The next morning, Captain Wuori and the members of the crew assisted by the members of the United States Coast Guard removed the water from the Melody's hold. Thus, the Melody, her equipment and cargo, was saved, without any assistance from the members of the crew of the Melody, with the exception of Rustad's assistance in removing libelant Syvanen from the Melody after he had made fast the tow line.

ARGUMENT

Whilest, the appellants have specified 10 assignments of error, nevertheless in their brief they state in effect that these assignments are in essence, that the services performed were not salvage of a high order since they contributed little to the ultimate success, and there was little danger, either to the salved property or to the salvors, and considering the value of the property, $17,500.00, the award was too high. In other words, it is their contention, as we understand it, that the court erred in making the award in the amount that it did and that such award is too high. Since this court, if it disallows the appellees motion to dismiss the appeal, will try the case de nova, it appears to us that the whole law of awarding salvage is brought into consideration. There are many legal propositions involved in making a salvage award. And it is our thought that it would be better for us to set forth, as we have, the points and authorities which we consider pertinent and the proper rules to follow in making an award. Therefore, we shall argue the points and authorities in the order in which they are set forth.

POINT AND AUTHORITIES No. I. to-wit, is as follows:

MOTION TO DISMISS APPEAL

Subdivision (b) of Rule 73 of the Rules of Civil Procedure governing Appeals to the Circuit Court of Appeals, definitedly states that the notice of appeal shall state the name of the court to which the appeal is taken. If you will observe the petition for appeal, found on page 30 and 31 of the record, you will find that such petition does not name the court to which the appeal is taken and, likewise, the order allowing the appeal, found on pages 31 and 32 of the Record, does not name the court to which the appeal is allowed.

Thus, it would appear, since we understand the rules of the court have the same status as statutes, that appellees motion to dismiss the appeal should be allowed. The appellees filed a written motion to dismiss the appeal and notified appellants that appellees would call the motion up for argument at the time the argument is made on the appeal.

POINT AND AUTHORITIES No. II.

FRIVOLOUS APPEAL

An appellate court in reviewing the amount of a salvage award, the fixing of which involves the exercise of discretion by the lower court, is always reluctant to make any alteration thereof; it will not interfere with the decision of the court below as to the amount of salvage awarded unless the judgment has proceeded upon an erroneous principle or a misap-

prehension of the facts, or is grossly or manifestly excessive or inadequate. The fact that the appellate court might have allowed a greater or less sum if the question had first been presented to that court is no ground for increasing or reducing the award. In accordance with these principles, the award fixed upon by the lower court will not be increased on the ground that it is inadequate. The same rule is applicable in diminishing the amount fixed upon by the lower court, and the amount so fixed will not ordinarily be diminished unless it can be said to be excessive as a matter of law.

47 Am. Jur., Salvage, Sec. 46, pg. 289.

We observe, according to the above rule, that the appellant court is always reluctant to make any alteration in the award and will not interfere with the amount of salvage awarded, unless the judgment has proceeded upon an erroneous principle or misapprehension of fact, or is grossly or manifestly excessive or inadequate. Since it is always a difficult problem to arrive at a proper award, and so recognized by the admiralty law, the fact that the appellate court may have allowed a greater or less sum if the case was first presented to it is no ground for increasing or reducing the award.

It appears from appellants' argument that they are peeved and dissatisfied with the amount awarded ap-

pellees in the lower court and they simply disagree with Judge McColloch's determination of the facts. There is no contention made by the appellants that the lower court was in error upon the law. They simply cite cases wherein, in those particular cases, a lower award was granted. But those cases were not based upon similar facts to those in this case. There was ample evidence to justify all of the findings of fact and, thus, it is our contention that no error can be demonstrated in this respect for none occurred.

The testimony of the witness for the appellees was to the effect that they thought the vessel "Melody" was sinking, likewise Coast Guardsman Gaither so thought, R. 331, and they were apprehensive of getting the vessel into Astoria during the coming flood tide. In this respect we call the court's attention to a misprint in the record where Charles Wuori was reported to have stated: R. 53

> "* * * so we were able to get that in on the next **flat** tide in the Columbia."

The use of the word **"flat"** was a misinterpretation by the reporter. Obviously the word was **"flood."** Mr. Wuori is Finnish and speaks with a Finnish brogue and is at times difficult to understand.

This court takes judicial knowledge of the tides and currents of the Columbia River and the general dangerous

conditions of the Columbia River in the vicinity of Peacock Spit. This is common knowledge and history. It is a matter of common knowledge that many vessels and lives have been lost in this vicinity.

We have cited Current Tables, Pacific Coast, North America and Philippine Islands, for the year 1945, published by U. S. Department of Commerce, Coast and Geodetic Survey. At page 95 thereof, referring to that, we find that the average flood tide at Cape Disappointment Light, 1 3-8 miles S. 25° E. of Cape Disappointment Light is 2.6 knots and at the same location the average ebb tide is 4.3 knots and ½ mile of northeast of Clatsop Spit the average velocity of the flood tide is 1.8 knots and the ebb tide 3.5 knots.

It takes no mathematician to figure that had the tow not been undertaken at the time appellees did start the tow, and the tow was not started until the arrival of the Coast Guard vessels, which would have been over 2 hours later at the point of the commencement of the tow, to definitedly determine that the tow would not have been completed on the flood tide, and, likewise, it takes no mathematician to take into consideration the length of the time it took to make the tow, to definitedly determine that all 3 vessels engaged in the tow could not have handled it against a 3.5 to 4.3 knot ebb tide—simply a physical impossibility.

Whether the vessel "Melody" would have remained afloat during the intervening period before the next flood tide is a question that this court and no one else will ever know. We have not cited a lot of cases showing salvage awards for the simple reason that it is our view of the law that each case is decided on its own merits upon the rules of law, which we have set forth in our points and authorities.

Appellants criticized the finding that Mr. Wuori did not explain satisfactorily why he lost one and one-half fishing trips. We call your attention to R. page 124 and 125 the matter is here explained.

It appears to us that this is a frivolous appeal. Appellants, of course, had knowledge of the point and authority we are here discussing. They have not pointed out where the court was in error in any principle of law or established any lack of proof of any finding. Its appeal looks to us to be a wild fishing expedition. It seems that, if this court sustains the lower court, which to us it appears it cannot do otherwise, damages should be awarded for a frivolous appeal.

POINTS AND AUTHORITIES No. III.

GOVERNMENT ASSISTANCE

Where a government vessel and others co-operate in a salvage service, the proper method of making an award to the latter is to fix the value of the entire service and deduct the share earned by the government ship.

Central Wharf Towboat Co., et al. v. United States, (The Anahuag), 295 Fed. 246.
United States v. Central Wharf Towboat Co., 3 Fed. (2d), 250.
47 Am. Jur., Salvage, Sec. 26, pg. 277.

The two cases cited are salvage cases wherein the United States Coast Guard vessels assisted in the salvage and both cases announced the legal doctrine that the proper procedure is to determine the total value of the salvage service and then deduct therefrom the value of services rendered by the government and award the balance to libelants. The law in this respect is clear.

POINTS AND AUTHORITIES No. IV.

RULES OF SALVAGE AWARD

Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for a salvage service: (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued.

The Ship Blackwall, her tackle, etc., James Creary, claimant, vs. The Sancelito Water and Steam Tug Company, and George Clark, 19 L. ed., pp. 870-875.

47 Am. Jur., Salvage, Sec. 33, pg. 281.
47 Am. Jur., Salvage, Sec. 6, pg. 265.

The United States Supreme Court, in the case of The Ship Blackwall, her tackle, etc., James Creary, Claimant, vs. The Sancelito Water and Steam Tug Company and George Clark, 19 L. ed., pp. 870-875, held that Courts of Admiralty usually consider six circumstances as the main ingredients in determining the amount of the award to be decreed for a salvage service. We will discuss them in the order set forth by the Supreme Court.

FIRST: THE LABOR EXPENDED BY SALVORS IN RENDERING THE SALVAGE SERVICE.

The salvage services began about 3:00 o'clock in the afternoon and terminated at about 1:30 o'clock in the morning of the next day, and about four (4) hours more were expended by Captain Wuori and his crew and the United States Coast Guard in removing water from the Melody's holds. All labor was done and performed necessary to conclude a complete salvage of the Melody, her equipment and cargo of tuna fish.

We cannot see how we can assist the Court in discussing these facts. The Court has read the testimony on what was done in the way of labor. The main thing, as we understand it, is that all labor was performed that was necessary to a full and complete salvage of the Melody, her equipment and cargo.

SECOND: THE PROMPTITUDE, SKILL AND ENERGY DISPLAYED IN RENDERING THE SERVICE AND SAVING THE PROPERTY.

There is no question but that Captain Wuori and the crew of the Stampede II acted quickly. First, upon observing the Melody, they forthwith proceeded alongside her and looked for her crew, and upon observing that there were no crew aboard, the Stampede II was navigated in circles around the Melody, seeking for the Melody's crew, and Captain Wuori notified the United States Coast Guard at its station at the Port of Astoria, Oregon, of the facts, and requested they make an immediate search for the crew, as well as send assistance to the Stampede II to attempt to save the Melody, her equipment and cargo. In the meantime, the crew of the Stampede II came to the conclusion when none of the members of the crew of the Melody could be found that some accident like an explosion had taken place within the Melody and that the crew were trapped inside. Thereupon, a line was made fast from the Stampede II to the rudder stock of the Melody, and the tow started and headed on a course that was hoped would timely put the tow in position to enter the Columbia River during the flood tide. It was a race in this respect, but the race was won and the Melody, her equipment and cargo, saved. No one can question that the making fast of a tow line to the

Melody's rudder stock was skillful. The Coast Guard preferred to chop a hole through the deck for this purpose rather than to proceed as did libelant Syvanen. Of course, speed at this time was not quite so essential, for the Melody was under tow and under way. When Syvanen performed the task, all members of the crew of the Stampede II thought that the Melody would sink most any time. It has not been suggested that Wuori and his crew did not act promptly and with skill and energy in engaging in the salvaging undertaking. On the contrary, he is accused of wanting to save the property and make a salvage case. It is a glaring fact in this case that neither Captain Rustad nor any member of the crew of the Melody, or any member of the Coast Guard, ever at any time during the entire salvage operations made any verbal objection to anything that Captain Wuori or any member of his crew were doing, or failed to do. This is conclusive that the salvage was undertaken with promptness, skill and energy. There is one fact that we shall never know and that is, whether or not the Melody would have sunk and become a total loss if the tow had not been started when it was started and end in a complete success when it did end. We have the testimony of the crew of the Stampede II that they feared it would sink at any time. Captain Rustad and some of his crew were of that opinion when they jumped into

the sea from fear that they would come to their death with the sinking Melody.

THIRD: THE VALUE OF THE PROPERTY EMPLOYED BY THE SALVORS IN RENDERING THE SERVICE, AND THE DANGER TO WHICH SUCH PROPERTY WAS EXPOSED.

If we apply the rule suggested by the Insurance Company's adjuster, as we recall it, the value of the two Coast Guard boats would be in the neighborhood of $40,000.00. Mr. Wuori does not agree with this rule. He contends that the Stampede II was worth $35,000.00 at the time of the salvage operations, and he bases this on two propositions: First, he knows the value of fishing vessels of the type of the "Stampede II." He has fished for 35 years, and during all of this time, he has owned deep-sea craft. Second, he was offered $35,000.00 for the Stampede II a short time ago. The value that Mr. Wuori placed on the Stampede II was not questioned.

The dangerous incident to the salvage operations were enumerated by Mr. Wuori and his crew. All admit there was real danger in the work performed by Mr. Syvanen. There was danger when approaching the Melody that the wheel of the Stampede II would be fouled on nets and lines attached to the Melody. If such should happen and the Melody sink before said

lines could be released from the propeller, the Stampede II might be caused to sink and become a total loss or seriously damaged.

It is a matter of history of which the Court can take judicial knowledge that the waters on the bar at the mouth of the Columbia River and vicinity are exceedingly dangerous and have caused the loss of many ships and the lives of hundreds of men. Peacock Spit over which the current of the river prevails in a Northwest direction is ever ready to take into its folds the vessel momentarily disabled. The tow had to pass at night within a short distance of these and other dangerous waters. It takes no imagination to conclude that three vessels engaged in towing a waterlogged vessel in the night time over this part of the Columbia River is dangerous to said towing vessels and their respective crews. Another danger was the mine field. After passing the Peacock Spit area a short distance, the mine field presents a hazard, to the tow and salving vessels and their respective crews. To prepare to navigate this area, Captain Wuori suggested to shorten the tow line, and whilst shortening his tow line, the propeller of his vessel became fouled with the tow line of the Triumph. It is not entirely clear just what caused this. It all happened, according to the officer in charge of the United States Coast Guard vessel "Triumph," in a matter of minutes. R. 267.

The towing vessels were 50 to 100 feet abreast of each other, so it is obvious that the time was short. In any event, it demonstrates that there was actual and continuous risk and danger in making this tow. It was one of the many hazards. No one can censure Captain Wuori for being concerned over the position in which he found himself. Fortunately, the tow line of the "Triumph" was Manila and not steel. Thus, it could be more easily cut. Had it been steel, the danger would have been greater. Fortunately, by good seamanship and energy, the Stampede II was able to free the line from the propeller and go under tow of a third United States Coast Guard boat. This was a matter of caution and good seamanship under the circumstances, but not necessary, for the Stampede II was not incapacitated. R. 73.

FOURTH: THE RISK INCURRED BY THE SALVORS IN SECURING THE PROPERTY FROM THE IMPENDING PERIL.

What we have stated immediately above under the **THIRD** circumstance and main ingredients in determining the amount of the award applies to this, the **FOURTH** circumstance in determining the amount of the award.

We know the waters at the mouth of the Columbia River are historically dangerous to ships and crew and

have claimed many vessels and caused the loss of many hundreds of persons. The tow through these dangerous waters was at night. Other shipping was going in and out of the river. Three vessels were engaged abreast in making the tow. It was all important that the tow be completed and the Melody beached before the tide started to ebb. This race was won by a scant approximate one-half hour, and the Melody, her equipment and cargo, saved.

By promptness and skill on behalf of the libelants and the United States Coast Guard, the dangerous incident to the tow were avoided and valuable property saved.

FIFTH: THE VALUE OF THE PROPERTY SAVED.

There is a dispute in the facts here. Captain Wuori contends that the Melody and her equipment, after the salvage was completed, was worth in the neighborhood of $32,000.00, and the cargo is admitted by the pleadings to be of the approximate value of $1,400.00. The Insurance adjuster values the naked cost of the Melody at $20,000.00. The Adjuster did not take into consideration a bait tank of the approximate value of $4,000.00, or the $1,400.00 cargo of tuna fish. If we add these items, the value would be $25,400.00. If we deduct the cost of repairs (Respondents' Exhibit No. 5), we have

a total valuation of the vessel, her equipment and cargo, of the sum of $19,235.55, according to respondents' contention. The Lower Court found the value to be $17,500. R. 27.

Regarding Respondents' Exhibit No. 5, we are far from satisfied with the cost of repairs. It is not segregated in a manner at all satisfactory. It is not dated. Sums are lumped. We were and still are perplexed why the repair man was not called. Why were we not given an opportunity to have an explanation of this bill? It is certainly an unusual procedure. Thus, we view it with suspicion.

SIXTH: THE DEGREE OF DANGER FROM WHICH THE PROPERTY WAS RESCUED.

What we have said before applies to the above circumstance as one of the main ingredients in determining the award.

To briefly recapitulate—

Three of the four libelants stated that during the time they observed the Melody before they entered upon the tow, the vessel was sinking deeper and deeper in the water and that it was their judgment that she was momentarily liable to completely sink and become a total loss. Rustad and his crew also thought the same. If not, why was no effort made to fasten a line

to the Melody from their life raft? Once the tow was undertaken, it was at all times kept under way. A waterlogged vessel kept under way is less likely to sink, for the action of the water on the bottom thereof acts as a lifting plane.

The dangerous waters in the vicinity of the mouth of the Columbia River were safely navigated, and using respondents' figures of value, a vessel and her equipment and cargo, worth $17,500.00 as found by the Lower Court were saved.

As elsewhere pointed out in our argument, the Melody was beached shortly before high water, according to the tide table, which is an exhibit in this case. It is obvious that had not the Stampede II promptly undertaken the tow when she did—some 2½ hours before assistance arrived—the Melody could not have been salved on the coming flood or incoming tide, commencing at 8:04 P. M., Pacific War Time, but would have had to await the next flood tide beginning at 8:50 A. M. Pacific War Time the next day. Who is there to say that the Melody could have been kept afloat these additional 12 hours.

POINTS AND AUTHORITIES No. V.

EFFECT OF ASSISTANCE

If part of a salvage service is performed by one set of salvors, and the salvage is afterward com-

> pleted by others, the first set is entitled to a reward pro tanto for the services they actually rendered even though the part they took, standing by itself, would not in fact have effected the salvage. 47 Am. Jur., Salvage, Sec. 26, pg. 277.

We cannot see how we can hope to assist the Court in arguing this legal doctrine in connection with the facts. The doctrine is so clear and well settled that it does not seem possible that the minds of lawyers could differ on its meaning or on its proper application to the facts in the case at bar.

POINTS AND AUTHORITIES No. VI and No. VII.

IV.

DERELICT

> Derelict vessels and other property constitute subjects of salvage. A vessel or cargo is derelict within the rules of the maritime law relating to salvage when it is abandoned without hope of recovery and without intention of returning to it. It is immaterial whether the abandonment arises from accident, necessity, or voluntary dereliction.
>
> 47 Am. Jur., Salvage, Sec. 4, pg. 263.

V.

QUASI DERELICT

> In salvage proceedings where the circumstances do not constitute the vessel in question a derelict, but are of such a nature as to render the services performed in saving it highly meritorious, the courts have sometimes applied the term "quasi derelict" to the vessel. Thus, the term has been

> applied to a vessel in a desperate condition, where the persons on board were incapable, by reason of their mental and physical condition, of doing anything for their own safety. So, also, it has been held applicable to a vessel left by its master and crew when thought to be sinking, where the master had gone immediately for assistance, and the vessel was finally brought to port.
>
> 47 Am. Jur., Salvage, Sec. 5, pg. 264.

We will discuss these two POINTS AND AUTHORITIES together.

The fact that the Melody, her equipment and cargo, was a derelict or quasi derelict does not in itself arbitrarily increase the amount of the award to the salvors. If she was a derelict, or quasi derelict, the Court can, in its discretion, consider that fact and decree an increase in the amount of the award that it would decree, if such fact were not present.

Was the Melody, her equipment and cargo, a derelict? There is no question but that the entire crew abandoned the ship. They never made any attempt to make fast a line from their life raft to the Melody. After all says Rustad, the owner, he was insured to the full value of the Melody. Abandonment is rather a question of intention. The above fact would seem to prove an abandonment.

It is most strange and unusual, as we have remarked before, that out of a crew of five, only Captain Rustad

appeared as a witness at the trial; nor was their absence accounted for, or was any attempt made to account for their absence. Since these four stalwart fishermen did not appear, or their absence explained, we can do naught else than assume that their testimony would have been that it was their intention to abandon the ship and get safely to shore. Thus, the ship was a derelict when the tow line was made fast from the Stampede II to the Melody. Did not Captain Rustad say he thought that Captain Wuori was attempting to make a salvage claim when he and his crew arrived at the scene safely aboard the crash boat? Did he or any member of his crew make any verbal objection, or voluntarily offer any assistance or advice to the Stampede II or her crew? No, they did not. The only thing they did was to refuse to apply chaffing gear to the Manila line attached to the rudder stock of the Melody, as requested by Captain Wuori. Everything points to the fact that the Melody was a derelict.

POINTS AND AUTHORITIES No. VIII.

INJURY TO SALVING VESSEL

> It is settled that a salvage award should include damages suffered by the salving vessel due to the necessities of the service.
>
> 47 Am. Jur., Salvage, Sec. 36, pg. 283.

Since this doctrine is so clear and well settled, we feel that we cannot aid the Court any at this time by

arguing the same.

POINTS AND AUTHORITIES No. IX, No. X, and No. XI.

IX.

THE AWARD FOR SALVAGE SERVICES

Salvage is not viewed by the admiralty courts merely as pay on the principle of a quantum meruit, but as a reward given for perilous services voluntarily rendered, and as an inducement to seaman and others to embark in such undertakings to save life and property.

The Blackwall v. Sancelito Water & Steam Tug Co., (The Blackwall), 10 Wall 1, 19 L. ed. 870.
47 Am. Jur., Salvage, Sec. 31, pg. 280.

X.

AMOUNT OF AWARD FOR SALVAGE SERVICES

The question of the amount of the salvage award is always a difficult one. It is largely a matter of fact and discretion which cannot be reduced to precise rules, but depends upon a consideration of all the circumstances of each case. No rule of law can be laid down that a certain percentage of the property saved should go as salvage in every case; generally, when a proportion of the thing saved has been awarded, a half has been the maximum, and an eighth the minimum. Below that it is usual to adjudge a specified sum or amount of money.

47 Am. Jur., Salvage, Sec. 32, pg. 280.

XI.

APPORTIONMENT

The salvage awarded is apportioned among the owners, the master, and the crew, the owners of

> the ship recovering a substantial portion, usually from one fourth to one half of the entire amount, in order to encourage them to permit their master to render such services. To the master should be allotted from one-eighth to one-third, for the master is a person who ought to be generally encouraged because upon him rests the whole responsibility of employing the ship. The balance should be awarded to the crew of the salving ship.
>
> 47 Am. Jur., Salvage, Sec. 38, pg. 285.

Since these are all allied, we shall discuss them together.

Discussing POINTS AND AUTHORITIES No. IX. and No. X. aforesaid—

It is well settled, and has been for many, many years, that the amount of the award should be ample and liberal to induce others to engage in such service. The amount lies wholly within the discretion of the Court. The only evidence offered on this subject was given by Captain Wuori, whose judgment was, that an award be decreed to the Stampede II and her crew in an amount equal to one-third of the value of the Melody, her equipment and cargo, at the termination of the salvage, plus the costs of the tow line lost, oil, and radio telephone calls, which, as we recall, amounted to approximately $300.00. R. 199. This to us seems fair, taking into consideration the service performed, the risks incurred, and the result accomplished, and, further, taking into consideration the fact that the Stam-

pede II and its crew lost a trip and a half of fishing, which would have netted between $4,000.00 and $5,000.00, R. 198-125, all without the hazards that accompanied the salvage operations.

Discussing POINTS AND AUTHORITIES No. XI.

We have set forth under this heading the general rule on the apportionment of the award. The rule seems to be well settled. We only desire to discuss one feature involved in this doctrine.

We feel that a special award should be decreed to libelant Syvanen. Without arguing at length his contribuation to the success of the salvage, it is admitted by all that he risked his life and limb in making fast the Manila line to the rudder stock of the Melody. Without a line made fast to the Melody, the salvage could not be made. There was real danger of the Melody suddenly sinking. There was danger that if this happened, he might be entangled in the ropes and fish hook in the cockpit and carried to his death or seriously injured. There was danger of serious injury by a sudden tossing of the Melody such as caused her capsizing, as related by Captain Rustad. These facts and others set forth in the record, in our opinion, justified the lower Court in making a special award to libelant Syvanen.

IN CONCLUSION, we call the Court's attention that we have repeatedly cited Volume 47, American Jurisprudence. Our reason for this is, that the treatise on the law of salvage found in this volume is of recent date. It is copyrighted in 1943. In checking the authorities, it appeared to us that this treatise is well edited and accurate and contained the late law. The treatise is clear and concise and sets forth about all that can be said on the law of salvage on the points involved herein.

We trust that our efforts herein have been of some assistance to the Court and lessened its labors and that the decree of the Lower Court be sustained.

Respectfully submitted,

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